IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 162/22
SCA CASE NO: 167/2021
GP CASE NO: 24552/2019

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Applicant
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Second Applicant

and

LUKE M TEMBANI	First Respondent
LMT ESTATES (PVT) LTD	Second Respondent
WYNAND HART	Third Respondent
QUEENSDALE ENTERPRISES (PVT) LTD	Fourth Respondent
MADODA ENTERPRISES (PVT) LTD	Fifth Respondent
KLIPDRIFT ENTERPRISES (PVT) LTD	Sixth Respondent
MIKE CAMPBELL (PVT) LTD	Seventh Respondent
RICHARD THOMAS ETHERIDGE	Eighth Respondent
ANDREW KOCKOTT	Ninth Respondent
TENGWE ESTATES (PVT) LTD	Tenth Respondent
CHRISTOPHER MELLISH JARRETT	Eleventh Respondent
STUNULA RANCHING (PVT) LTD	Twelfth Respondent
LACHABI RANCH (PVT) LTD	Thirteenth Respondent
LARRY CUMMING	Fourteenth Respondent
FRANCE FARM (PVT) LTD	Fifteenth Respondent
MICHAEL IAN PATRICK ODENDAAL	Sixteenth Respondent
DEBORAH LOUISE ODENDAAL	Seventeenth Respondent
GRASSFLATS FARM (PVT) LTD	Eighteenth Respondent
MURIK MARKETING (PVT) LTD	Nineteenth Respondent

GIDEON STEPHANUS THERON	Twentieth Respondent
EBEN HAESER (PVT) LTD	Twenty-First Respondent
EDEN FARM (PVT) LTD	Twenty-Second Respondent
PETER HENNING	Twenty-Third Respondent
CHIREDZI RANCHING (PVT) LTD	Twenty-Fourth Respondent
BATALEURS PEAK FARM HOLDINGS (PVT) LTD	Twenty-Fifth Respondent

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THE APPLICANTS' (STATE'S) WRITTEN SUBMISSIONS

INTRODUCTION AND OVERVIEW

1 In *Law Society v President*,[1] in which five of the current respondents were co-applicants,[2] this Court declared that the President's[3] conduct – in participating in the SADC Summit's suspension of the SADC Tribunal and appending his signature to the 2014 SADC Tribunal Protocol – was unconstitutional. It also granted the relief specifically sought by those respondents of ordering the President to withdraw his signature of the 2014 Protocol.

2 The present twenty-five respondents are Zimbabwean farming companies and former Zimbabwean commercial farmers. Almost all are Zimbabwean citizens and companies (only six are South African citizens).[4] They have now sued the South African Government and President (**the State**) in delict for the losses (some R2 billion) they alleged they have suffered due to their inability to sue the Zimbabwean Government in the SADC Tribunal. The damages they claim represent what they alleged they would have been awarded had they been able to pursue claims in the Tribunal against the Zimbabwean Government.

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[1] *Law Society & Others v President of the Republic of South African & Others* 2019 (3) SA 30 (CC) (***Law Society***).

[2] The first, eighth, tenth, eleventh and fifteenth respondents were applicants in the *Law Society* matter, AA para 44.6 (V1 p 34); and see Interveners' FA (Annexure SM2) heading (V1 p 75) read with POC paras 1, 8, 10, 11, and 15 (V5 p 476-478).

[3] The President of the Republic of South Africa is the first applicant. The relevant conduct that is the subject matter of the claims, occurred prior to the current incumbent taking office. However, in these heads we refer to the "President" irrespective of the change of the holder of that office.

[4] The respondents are twenty-five Zimbabwean farming companies and former Zimbabwean commercial farmers. Nineteen of the twenty-five respondents are non-South Africans (fifteen Zimbabwean companies and four Zimbabwean citizens). The remaining six respondents are former Zimbabwean commercial farmers that are South African citizens. The second, fourth, fifth, sixth, seventh, tenth, twelfth, thirteenth, fifteenth, eighteenth, nineteenth, twenty-first, twenty-second, twenty-fourth, and twenty-fifth respondents are Zimbabwean companies, see POC paras 2, 4, 5, 6, 7, 10, 12, 13, 15, 18, 19, 21, 22, 24, and 25 (V5 p 476 – 479). The first, ninth, eleventh, fourteenth respondents are Zimbabwean citizens, see POC para 1 (V5 p 475), para 9 (V5 p 477), para 11 (V5 p 477), and para 14 (V5 p 478). The third, eight, sixteenth, seventeenth, twentieth, and twenty-third respondents are South African citizens, see POC paras 3, 8, 16, 17, 20 and 23 (V5 p 476 – 479).

3 The respondents (as plaintiffs) thus seek to hold the State delictually liable –

3.1 for the President's executive act in appending his signature to the 2014 Protocol (and his participation in the SADC Summit's decision to suspend the Tribunal),

3.2 which they allege caused them pure economic loss,

3.3 in a foreign country,

3.4 and for which the direct wrongdoer is the Zimbabwe Government, not the President or the South African Government.[5]

4 The State accordingly excepted to the particulars of claim on the basis of a failure to establish causation and wrongfulness.

5 The respondents had also waited until this Court handed down judgment in the *Law Society* matter to sue the State, contending that it was only then that their cause of action had crystallised. In this way, they sought to escape prescription and their failure timeously to comply with the Legal Proceedings Against Certain Organs of State Act 40 of 2002 (**the Legal Proceedings Act**).

6 The State opposed the respondents' application for condonation under the Legal Proceedings Act.

7 This appeal raises two crisp constitutional issues of significant public importance:

7.1 First, are the respondents' damages claims barred by the Legal Proceedings Act, because they failed to give timeous notice, or did their claims only fall due

[5] The Government is the second applicant.

when this Court declared the President's conduct in respect of the SADC Tribunal unconstitutional in *Law Society*?

7.2 Second, whether the respondents' damages claims are bad in law *inter alia* because, as the High Court held, "*the South African government bore no liability to pay monetary compensation to non-South African nationals for acts committed outside South Africa by the government in breach of the Constitution*"?[6]

8 If determined in the State's favour, these fundamental constitutional issues will mean that the respondents' claims are statutorily barred and bad in law. In the circumstances, this would bring an end to these claims. It is, therefore, vital and in the interests of justice that this Court grant leave to appeal and pronounce on these matters.

9 This is particularly so since, if the claims were held to be good, it would open the floodgates of similar litigation by foreign nationals who allegedly suffered loss abroad as a consequence of the executive's conduct of South Africa's international relations. The State is already faced with a further 52 summons by similarly situated former Zimbabwean farmers, who recently instituted almost identical claims to the current respondents, claiming an additional R5 billion in damages allegedly arising from the President's unconstitutional participation in the suspension of the SADC Tribunal and signature of the 2014 Protocol.[7] Those claims were, by agreement, held in abeyance pending the determination of this matter by the SCA.[8] They continue to be held in

[6] High Court judgment para 45 (V6 p 538), read with paras 46 to 51 (V6 p 539 – 542); and in relation to the absence of factual causation see paras 41 to 42 (V6 p 536-537).

[7] FA leave to appeal para 21, V5 p 393. In addition to the 51 summons referred to in the founding affidavit in this Court, a further summons by two plaintiffs, also pleaded in almost identical terms to all the other summons, was delivered in January 2023.

[8] FA leave to appeal para 21, V5 p 393.

abeyance pending this Court's determination of this matter.

10 We structure the remainder of our submissions as follows:

10.1 First, we summarise the litigation history.

10.2 Second, we show why the Legal Proceedings Act bars the claims.

10.3 Third, we demonstrate that the claims are bad in law.

10.4 Fourth, we explain why this Court should grant leave to appeal.

SUMMARY OF THE LEGAL PROCEEDINGS ACT APPLICATION AND EXCEPTION

11 The High Court faced two separate matters under the same case number, which were heard together. [9]

12 The first is the respondents' application for condonation for the late filing of their section 3 Notice[10] under the Legal Proceedings Act (**the Legal Proceedings Act application**). The respondents instituted this application simultaneously with their damages claims. They were required to bring the application because the State had, on request, confirmed in correspondence that it would rely on the respondents' failure to give timeous notice under the Legal Proceedings Act to argue that the claims were barred by the Act. The respondents specifically plead in their particulars of claim that the State had taken this position, and that, therefore, they had contemporaneously lodged an

[9] FA leave to appeal para 22, V5 p 393 (the matters were heard together by order of the Acting Deputy Judge President)

[10] For ease of reference, in these heads we refer to the section 3 Notice, as a collective reference to the original notice, followed a few weeks after was rectified by a subsequent notice. High Court judgment paras 12 to 13, V6 p 528 (as the Court notes, the respondents initially served a section 3 notice on 14 December 2018, but then supplemented that with a further notice on 15 January 2019, which for the first time listed all twenty-five of the respondents and the amounts of their claims).

application for condonation under the Act, to the extent necessary.[11]

13 The respondents brought the application conditionally because they argued that, despite what was contended by the State, their section 3 Notice was served timeously. This was because their claims were only due once this Court gave judgment in the *Law Society* matter. They also submitted that if condonation was required, it should be granted, *inter alia* because their claims had not prescribed.

14 The State opposed the application on the basis that while condonation was required in terms of the Legal Proceedings Act, the claims had prescribed in terms of the Prescription Act 68 of 1969 (**the Prescription Act**). Therefore, in terms of section 3(4) of the Legal Proceedings Act, the respondents' late service of the section 3 Notice could not be condoned. Accordingly, the State prayed for an order dismissing the application with costs.

15 The second matter is the State's exception to the respondents' particulars of claim, in terms of which it was averred that the particulars of claim did not disclose a cause of action on various grounds, including that the pleaded claims could not establish causation or wrongfulness (there being no legal duty).[12]

16 In the Legal Proceedings Act application, the High Court held the respondents' section 3 Notice had *not* been delivered late, because their claims only fell due when this Court gave judgment in the *Law Society* matter, and therefore condonation was not required. The Court expressly made this finding, holding that it did not need to grant an order in

[11] POC paras 47 and 48, V5 p 501.

[12] There were other grounds of exception, dismissed by the High Court, which the State did not seek leave to appeal to the SCA.

respect of the application, save in relation to costs. The Court, accordingly, expressly ordered that there would be no order as to costs of the Legal Proceedings Act application. The Court thus refused to grant the relief sought by the State, that the application should be dismissed with costs.

17 In the exception, the High Court held that the respondents' claims were bad in law because on the pleaded case the President was neither the factual nor the legal cause of the respondents' losses (*inter alia*, since the appropriate relief granted by this Court's *Law Society* decision had thwarted the attempt to remove the Tribunal's jurisdiction and because the State bore no liability to non-South Africans for losses suffered abroad). The High Court otherwise dismissed the State's grounds of exception.

18 Despite leave to appeal having been granted,[13] as we explain in the next sections, the SCA engaged with none of the central legal issues in the Legal Proceedings Act application and exceptions before it. Instead, it adopted an impermissible technical approach that avoided determining the merits.

THE RESPONDENTS' CLAIMS ARE BARRED BY THE LEGAL PROCEEDINGS ACT

19 In terms of the Legal Proceedings Act, the respondents' delictual claims are debts, which require notice to be given to the State within six months after they become due.[14] In terms of section 3(4) of the Legal Proceedings Act, a court cannot grant condonation for the late delivery of a section 3(1) notice if the debt has prescribed.[15] Therefore, the SCA has accepted that where condonation is required and sought, the court must

[13] Leave to appeal Order paras 1-6 (V4 p 362). The parties agreed on the terms of the leave to appeal order, which the Court fully associated itself with (Leave to Appeal Judgment para 1, V4, p 361).
[14] High Court judgment paras 16 and 17, V6 p 529, and sections 3(2)(a) and 3(3)(a) of Legal Proceedings Act.
[15] *Minister of Public Works v Roux Property Fund (Pty) Ltd* [2020] ZASCA 119 (***Roux Property***) para 17.

determine whether the debt has prescribed.[16] If it has prescribed, then condonation may not be granted, and the substantive application for condonation must be dismissed.[17]

20 The State submits that the respondents' damages claims have prescribed, and therefore condonation, which is required, had to be refused by the High Court. The respondents dispute this. In their Legal Proceedings Act application, and in argument in the High Court and SCA, they posit two grounds for why they say their claims have not prescribed:

> "Judicial review proceedings attacking the President's signature [of the 2014 Tribunal Protocol on 18 August 2014] were instituted seven months later on 19 March 2015. As mentioned, the Constitutional Courts judgment – confirming the unlawfulness of the President's signature, setting it aside, and directing the withdrawal of the signature – was delivered on 11 December 2018.
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> For reasons more fully to be advanced in legal argument, prescription was either stayed for the full duration of the administrative review proceedings culminating in the Constitutional Court's judgment; or it did not commence running at all until the Constitutional Court's judgment."[18]

21 The High Court agreed with the respondents' second proposition: their debts were not due and, therefore, prescription did not begin to run (and their section 3 Notice did not need to be served), until this Court gave judgment in the *Law Society* matter (declaring the President's participation in the suspension decision and signature of the 2014 Protocol "*unconstitutional, unlawful and irrational")* on 11 December 2018.[19] The High Court, therefore, held that the respondents' Legal Proceedings Act application was not required (notice having been given less than six months after this Court judgment).[20] Thus, the High Court found it unnecessary to determine whether the institution of the

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[16] See e.g. *Roux Property* paras 3 to 17.
[17] Section 3(4) of the Legal Proceedings Act and *Roux Property* ibid.
[18] V1 p 11-12, FA paras 7-8, emphasis added.
[19] *Law Society* para 97, orders 1.1 – 1.2.
[20] High Court judgment para 25, V6 p 531, read with paras 12 to 15, V6 p 528-529.

Law Society matter would have stayed the running of prescription.[21]

22 The High Court's findings are unsustainable. We explain why below. However, the SCA refused to address the merits of the State's appeal against the High Court's decision. It erroneously held that the High Court's failure to dismiss the Legal Proceedings Act application with costs and rather making an order that there would be "*no order as to costs"* in the application was not appealable. Below, in the leave to appeal section, we explain why this was plainly incorrect.

Legal Proceedings Act application had to be dismissed

23 This Court's and SCA's jurisprudence makes plain that debts are due when the minimum facts to institute action are known, not when legal conclusions such as invalidity or wrongfulness are known.[22]

24 As pleaded, and set out in the respondents' affidavits in the Legal Proceedings Act application, the respondents' damages claims are based on the President's conduct in relation to his participation in the suspension of the SADC Tribunal in 2011, and in particular, his signature of the 2014 Protocol, on 18 August 2014.[23] They allege that the President's conduct meant they could no longer institute or continue with their claims in the SADC Tribunal. They allege this caused them to suffer a loss representing what the SADC Tribunal would have ordered Zimbabwe to pay them had the Tribunal determined their claims. Therefore, their damages claims were due (and their cause of action was

[21] High Court judgment para 17, V6 p 529.

[22] See e.g. *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) (***Mtokonya****)* para 46; *Johannes G Coetzee & Seun and Another v Le Roux and Another* [2022] ZASCA 47 paras 20 - 22; *WK Construction (Pty) Ltd v Moores Rowland and Others* [2022] ZASCA para 33; *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) (***Yellow Star Properties***) para 37; *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) para 17.

[23] POC paras 39A to 42, V5 p 495; V1 p 11-12, FA paras 6-8.

complete) on 18 August 2014, when the last of the President's allegedly wrongful and loss-causing conduct occurred. The deemed due date would only be delayed if they only acquired, or reasonably could have acquired, knowledge of these relevant facts at a later date (pursuant to section 12(3) of the Prescription Act and section 3(3)(a) of the Legal Proceedings Act). But, at the very latest, by 21 July 2015, when the first respondent deposed to an affidavit in the *Law Society* matter, the respondents evidently knew or reasonably ought to have known all the necessary facts to institute their damages claims.[24]

25 Nevertheless, the High Court held that the respondents' claims had not prescribed because it mistakenly held that their "*cause of action was only complete upon delivery of the Constitutional Court's judgment in Law Society*" on 11 December 2018.[25] One of the predicates for this finding is that the High Court appeared to hold that the alleged wrongfulness of the President's conduct was not a legal conclusion.[26]

26 The High Court's grounds for determining when the respondents' claims were due (and prescription began to run) are fatally flawed. The position in our law is clear:

26.1 This Court has held that a debt becomes due when "*the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place*".[27] And, *"[i]n a delictual claim, the requirements of fault and*

[24] AA paras 36 to 38, V1 p 30 – 32. See also AA para 34-35, V1 p 30, read with FA para 10, V1 p 12, where the respondents, in fact, state that, "*[s]ince the signing of the 2014 Protocol, and during the process leading up to the launch of the LSSA's review application, the [respondents] have explored alternative legal means other than the institution of a claim against the applicants, to have their rights protected and enforced*."

[25] High Court judgment para 25, V6 p 531.

[26] High Court judgment para 24, V6 p 531 (the Court's apparent suggestion that the State's counsel did not "*seriously persist*" in arguing that "*wrongfulness*" is a legal conclusion in oral argument is not correct: the trite proposition was strenuously advanced in written and oral submissions).

[27] *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC) (***Links***) para 31, quoting from *Truter and Another v Deysel* 2006 (4) SA 168 (SCA) (***Truter***) para 16, emphasis added.

unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts."[28]

26.2 More recently, the SCA has confirmed that "*[t]he period of prescription begins to run against a creditor when the creditor has the minimum facts which are necessary to institute action*."[29]

26.3 That is why knowledge of legal conclusions, or a court's determinations of such legal conclusions, is irrelevant to the running of prescription. The SCA, relying on this Court's decision in *Mtokonya*, recently reaffirmed and summarised the position: "*Legal conclusions, such as the invalidity of a contract or that the delictual elements of negligence or wrongfulness have been established, are not facts. Neither is the evidence necessary to prove the essential facts*."[30]

27 Therefore, it is irrelevant for the purposes of determining when the respondents' damages claims fell due that this Court only finally determined and pronounced on the lawfulness and constitutionality of the President's conduct on 11 December 2018.

28 The unconstitutionality or unlawfulness of conduct are legal conclusions, not facts. Therefore, the date when a court reaches such legal conclusions does not affect when a debt based on that alleged conduct becomes due. Instead, what is required for a debt to fall due is the necessary *facts* that complete the cause of action to be in place, so

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[28] *Links* para 31, *Truter* para 17, emphasis added.

[29] *McMillan v Bate Chubb and Dickson Incorporated* [2021] ZASCA 45 para 38 (***McMillan***). See also *Van Heerden & Brummer Inc v Bath* [2021] ZASCA 80 (***Bath***) para 18; *Fluxmans Inc v Levenson* 2017 (2) SA 520 (SCA) (***Fluxmans***) para 42; *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) (***Gore NO***) para 17; *Claasen v Bester* 2012 (2) SA 404 (SCA) para 14.

[30] *MEC for Health, Western Cape v M C* [2020] ZASCA 165 para 7, relying on *Truter* paras 17 and 20 and *Mtokonya* paras 44-45 and 50-51.

that a party can institute the claim.[31]

29 This Court's declaration of unconstitutionality in respect of the President's conduct is a conclusion of law, not a fact. The respondents' damages claim became due when the President's allegedly wrongful and harm-causing conduct occurred (and was known or could reasonably be known),[32] not when a court declared that conduct unconstitutional.

30 Saner, in the most recent update of his seminal work, *Prescription in South African Law*,[33] has confirmed this approach: "*[w]here a public authority exercises a power unlawfully and in circumstances where it becomes delictually liable, it is submitted that prescription would start to run, and the "debt" would therefore become "due", on the date of the unlawful exercise of the power. It would not become "due" when the victim of the unlawful exercise first comes to learn of the unlawfulness, nor when a court holds that the exercise was unlawful*."[34]

31 And this Court has similarly confirmed that "*[a] claimant cannot blissfully await authoritative, final and binding judicial pronouncements before its debt becomes due, or before it is deemed to have knowledge of the facts from which the debt arises*."[35]

32 Not only is the wrongfulness of conduct undoubtedly a legal conclusion and not a fact,[36] but, in any event, this Court in the *Law Society* matter was dealing with a legality review, not a delictual damages claim. It made no finding that the President's conduct was

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[31] See e.g. *Mtokonya* para 48*; Links* para 31; and *Truter* paras 16-17.

[32] Section 3(3)(a) of the Legal Proceedings Act; and 12(3) of the Prescription Act.

[33] John Saner SC, *Prescription in South African Law* (October 2022 - SI 33) (**Saner *Prescription***).

[34] Saner *Prescription* p 3-101– 3-102, emphasis added.

[35] *Mtokonya* para 46 quoting Moseneke J in *Eskom v Bojanala Platinum District Municipality and Another* 2003 JDR 0498 para 16 with approval, emphasis added.

[36] See *MEC for Health, Western Cape v M C* [2020] ZASCA 165 (10 December 2020) para 7, relying on *Truter* paras 17 and 20 and *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) (***Mtokonya***) paras 44-45 and 50-51.

delictually wrongful.

33 Therefore, the respondents' damages claims became due when the President's alleged wrongful and loss-causing conduct occurred. Here the last of the alleged wrongful and loss-causing conduct occurred on 18 August 2014, when the President signed the 2014 Protocol (and the respondents had knowledge of those facts by no later than July 2015, when five of them intervened in the *Law Society* matter).

34 In response, the respondents rely on *Njongi*[37] and *Kirland*,[38] which, they allege demonstrate that prescription in relation to their delictual damages claims only began to run after this Court gave judgment in the *Law Society* matter.[39] But these cases are not authority for this proposition and are entirely distinguishable.

34.1 In *Njongi* this Court was only considering when, if at all, a public law claim for repayment of a social grant, which was required to be payable in terms of the Constitution, was due (and the Court doubted whether the constitutional obligation to make such payment was a debt that could prescribe at all).[40] Notably, the administrative decision that the Court accepted would need to be set aside before prescription in respect of the constitutional claim for repayment of the remaining social grant fell due, was the provincial government's unlawful decision to stop payment of the social grant. In other words, the fact of the administrative decision not to pay the social grant *factually* stood in the way of an order requiring the payment of the social grant. Therefore, a setting aside of the administrative decision refusing to make payment of the social grant was effectively a factual

[37] *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) (***Njongi***).
[38] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) (***Kirland***).
[39] See AA leave to appeal paras 102 and 103, V6 p 594-595.
[40] *Njongi* para 42, emphasis added.

element of the claim to obtain the payment of that social grant.

34.2 The position is completely different in the present case. The President's conduct that was challenged in the *Law Society* matter was not a decision not to make payment to the respondents (or anyone else). The conduct of the President that was challenged in the *Law Society* matter, which was his participation in the suspension of the SADC Tribunal and signing of the 2014 Protocol, did not stand in the way of the respondents' damages claims. Instead, the fact of the President's conduct is pleaded as the necessary causal predicate for the losses suffered and damages claimed.[41] Therefore, the respondents did not need to await this Court's declaration of unconstitutionality before they could have pursued damages claims for losses they alleged the President's conduct caused.

34.3 It is for this reason too that the respondents' reliance on *Kirland* (which holds that unlawful administrative action continues to exist in fact until set aside in an administrative review)[42] is misplaced. Not only was the President's conduct that was challenged in the *Law Society* matter not an administrative decision that was "*set aside*" in an administrative review by the Constitutional Court (it was executive action declared "*unconstitutional, unlawful and irrational*").[43] But, more importantly, as pleaded, it is not the non-existence of the President's conduct as a fact that is the basis for the respondents' damages claims (in other words, the factual existence of the President's conduct does not preclude their claims). Quite the opposite. The damages claims as pleaded are predicated precisely on the allegation that the President's conduct had already as a matter of fact occurred

[41] POC para 39A (V5 p 495), read with 31(e) (V5 p 482), 32(a) (V5 p 482), 32(b)(vi) (V5 p 483-484), 32(c)(v) (V5 p 484-485), 32(d)(vii) (V5 p 486-487), 32(e)(vi) (V5 p 487), and 32(f)(vii) (V5 p 489).
[42] *Kirland* para 90.
[43] *Law Society* para 97, orders 1.1 and 1.2.

and had on their argument already caused them harm (the inability to pursue their claims in the SADC Tribunal). Indeed, in the particulars of claim the respondents do not even allege that this Court ordered the President to withdraw the signature from the 2014 Protocol.

35 In conclusion, the position is made abundantly clear by the SCA's and this Court's decisions, *inter alia,* in *Mtokonya,*[44] *Fluxmans*[45] and *Yellow Star Properties*:[46] the respondents' damages claims fell due and should have been instituted once the President's unconstitutional conduct that is alleged to cause harm occurred. A court's determination that alleged loss-causing conduct was wrongful, unlawful, or unconstitutional are all legal conclusions. They are not facts that complete a cause of action.

The *Law Society* matter did not interrupt prescription

36 While the High Court did not reach this issue, before this Court,[47] and in their Legal Proceedings Act application, the respondents submitted that even if their damages claims were due prior to the *Law Society* judgment, in terms of section 15(1) of the

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[44] *Mtokonya* related to a delictual claim against the Minister of Police for damages arising from wrongful arrest and detention by the South African Police Service. This Court held that knowledge that conduct was "*wrongful and actionable*" was a conclusion of law and not a fact. (paras 51 and 62). This Court held that section 12(3) of the Prescription Act does not require a creditor to know that the conduct of his debtor is wrongful and actionable in law before prescription starts to run. If section 12(3) were to be interpreted in this manner this "*would render our law of prescription so ineffective that it may as well be abolished*." (para 63).

[45] *Fluxmans* paras 42-3 (The SCA held that the Mr Levenson's unjust enrichment claim had prescribed three years after he had paid the fees to Fluxmans in terms of the agreement that was statutorily invalid (regardless of when the Constitutional Court finally determined that such agreements were invalid), since "[*k]nowledge that the relevant agreement did not comply with the provisions of the Act is not a fact which the respondent needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription*.")

[46] In *Yellow Star Properties*, the applicant had sued the provincial government for damages. The provincial government had pleaded that the claim had prescribed. The applicant alleged that it was only once the High Court had delivered its judgment (in a separate application) finding that the sale of the land by the provincial government was invalid (because the provincial governments had acted ultra vires its powers in purporting to sell it to the applicant) that the applicant had knowledge of the facts required in terms of section 12(3) of the Prescription Act for debt to be deemed to be due. The applicant argued that until the High Court's judgment, it could not have known that the sale was invalid. The SCA rejected this contention and, inter alia, held that: "*It may be that the applicant had not appreciated the legal consequences which flowed from the facts, but its failure to do so does not delay the date prescription commenced to run*." (para 37).

[47] AA leave to appeal paras 105 to 106, V6 p 595 – 596.

Prescription Act, the *Law Society* matter interrupted the running of prescription in respect of their damages claims. Therefore, on the respondents' argument, while the respondents would require condonation because their section 3 Notice was filed more than six months after their claims were due, condonation could be granted because their claims had not prescribed. These submissions have no merit.

37 As the SCA confirmed in *Peter Taylor, "s 15(1) of the Act entails three requirements for prescription to be interrupted. They are: (a) a process; (b) served on the debtor; and (c) by means of which the creditor claims payment of the debt."*[48]

38 Evidently, the institution of the *Law Society* matter, and intervention in that matter by certain of the respondents, do not meet the third requirement of section 15(1). They were not a process served on the applicants "*by means of which the creditor claims payment of the debt*." We explain why below.

39 ***First***, in the *Law Society* matter, the applicants in that matter (initially the Law Society, then joined by five of the current respondents and one further applicant) sought only relief declaring the President's conduct unconstitutional and an order requiring the President to withdraw his signature of the 2014 Protocol.[49] No claim for payment of any money was made against the President or the two ministers who were also cited. The Government (the second applicant) was not cited at all. Nor even was any declaration sought that the President was liable to the respondents, or any other parties, to compensate or pay damages for any loss they had suffered.

39.1 Therefore, clearly, the respondents' damages claims ("*the debts*") were not

[48] *Peter Taylor & Associates v Bell Estates (Pty) Ltd* 2014 (2) SA 312 (SCA) (***Peter Taylor***) para 8.
[49] AA para 44.3, V1 p 33; *Law Society* para 7.

sought in that previous litigation. Consequently, it was not "*any process whereby the creditor claims payment of the debt.*"[50]

39.2 As Saner points out, given the critical elements of section 15(1), "*[i]t follows, therefore, that the institution of proceedings in related matters, but in which the relief claimed (i.e. the debt) is substantially different from the delictual damages claimed (and in respect of which prescription is pleaded) cannot act to interrupt prescription with regard to the latter*."[51]

39.3 Indeed, in *Saamwerk Soutwerke (Pty) Ltd v Minister of Mineral Resources*,[52] the SCA held that an application in which Saamwerk sought an order declaring it was entitled to a mining right in respect of Vrysoutpan, obliging the Minister to execute the mining right, and declaring invalid a mining permit (MP169/2004) in respect of Vrysoutpan held by SA Soutwerke (an administrative action) and certain interdictory relief against SA Soutwerke,[53] did not interrupt the running of prescription in relation to a delictual action against SA Soutwerke then brought for damages due to Saamwerk being deprived of a mining right.[54]

40 ***Second***, the constitutional relief sought and granted in the *Law Society* matter is not a "*debt*", as defined in the Prescription Act. This Court has made clear in a number of cases that "*debt*" in the Prescription Act has a limited meaning. It means "*something owed or due, or an obligation to pay money, deliver goods or render services to another.*"[55] It does not include "*every obligation to do something or refrain from doing*

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[50] Section 15(1), emphasis added.
[51] Saner *Prescription* p 3-294, emphasis added.
[52] *Saamwerk Southwerke (Pty) Ltd v Minister of Mineral Resources and Another* [2017] ZASCA 56 (***Saamwerk***).
[53] *Saamwerk* paras 13 and 15, read with para 9.
[54] *Saamwerk* para 56.
[55] *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others* 2017 (5) SA 9 (CC) (***Off-Beat)*** para 49.

something, apart from payment or delivery."[56] Similarly, and given this Court's determination of the limited scope of a "*debt*", a claim for a declaration of unconstitutionality and an order directing the President to remove his signature from an international agreement pursuant to section 172 does not constitute the claiming of a "*debt*". Therefore, the proceedings instituted in the *Law Society* matter could never be "*process whereby the creditor claims payment of the debt"*,[57] because those proceedings did not involve claiming a "*debt*" at all (let alone the same debt claimed in the respondents' delictual damages action).

41 ***Third***, the respondents sought to rely on the High Court decision in *Allianz Insurance*[58] to support their proposition that the *Law Society* matter interrupted the running of prescription. But this case is entirely distinguishable. It is certainly not authority for the proposition that an application seeking a declaration of unconstitutionality in terms of section 172 of the Constitution stays prescription in relation to damages claims.

41.1 In the comparable case of *Saamwerk*, discussed above, the SCA held that the case before it (where there had been a prior application, *inter alia*, to declare invalid a mining permit, and then a subsequent action for damages) did not fall within the parameters of the *Allianz Insurance* decision.[59] Therefore, the SCA held that the prior application to declare the mining permit invalid did not stay prescription in relation to the damages claim.

41.2 In *Peter Taylor,* the SCA considered the limited ambit of *Allianz Insurance*.[60] In

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[56] See *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) (***Makate)*** para 93, emphasis added, and see also *Off-Beat* paras 44 and 49.
[57] Section 15(1) of Prescription Act, emphasis added.
[58] *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) (***Allianz Insurance****)*.
[59] *Saamwer*k para 56.
[60] *Peter Taylor* supra.

that case, the SCA was required to interpret conflicting High Court views on the import of what was held in *Allianz Insurance*. The SCA overruled earlier High Court decisions which had sought to give a more expansive interpretation to section 15(1).

41.3 As explained by the SCA, and as is evident from a consideration of *Allianz Insurance*, the critical issue in *Allianz Insurance* was that the action for relief declaring that the defendant was liable to indemnify the respondents for all the damages they had suffered finally determined the liability of the defendant to the respondents. Hence, it would stop the running of prescription in respect of a subsequent action (should it prove necessary) to exact the payment pursuant to that liability.[61] The High Court in *Allianz Insurance* also emphasised that for one action to interrupt prescription in respect of a separate action, the cause of action in both must be the same (in that case, both actions were based on the right to an indemnification from the insurer).[62]

41.4 But in the present matter, the claim for a declaration of unconstitutionality and interdict requiring the withdrawal of the President's signature, as sought and granted in the *Law Society* matter, is an entirely separate claim and cause of action from the delictual damages claims that the respondents have now instituted.[63] The Court in the *Law Society* matter was not asked to, nor did it,

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[61] *Peter Taylor* paras 9 and 10; *Allianz Insurance* at 332I-J and 333B-C. We note that any attempted reliance by the respondents on the Namibian Supreme Court decision in *Lisse v Minister of Health and Social Services* 2015 (2) NR 381 (SC) is misplaced, since not only is it distinguishable but predates the SCA's decision and clarification of the limits of the *Allianz Insurance*, in *Pete Taylor*, and in *Saamwerk*, and it also, importantly pre-dates this Court's determination of the limited nature of a "*debt*", which would evidently not include a constitutional challenge in terms of s 172 (see discuss at paragraph 40 above).

[62] *Allianz Insurance* at 333B – C, see also *Nativa Manufacturing (Pty) Ltd v Keymax Investments 125 (Pty) Ltd and Others* 2020 (1) SA 235 (GP) para 38.

[63] See e.g. *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) (***Steenkamp***) para 37.

determine that the President bore private law (delictually) liability to pay damages to the respondents.

42 ***Fourth***, of the twenty-five respondents in the current matter (each of whom brings their own separate damages claims against the State), only the first, eighth, tenth, eleventh and fifteenth respondents were applicants in the *Law Society* matter.[64] Therefore, the majority of the respondents could never rely on the *Law Society* matter as proceedings whereby they (the "*creditors*") claimed *"payment of the debt*", since they were not party to those proceedings.

43 Therefore, in conclusion, section 15(1) cannot reasonably be interpreted to include an application to declare executive conduct unconstitutional in terms of section 172(1) as a process whereby "*the creditor claims payment of the debt",* so as to interrupt the running of prescription in respect of a delictual damages claim.[65] This is particularly so in this matter where most of the creditors (who each bring separate claims) were not even party to the relevant application (the *Law Society* matter).

The condonation could not be granted

44 Therefore, given what is set out above, the respondents' claims were due more than six months before their section 3(1) notice was given, and, in terms of section 3(4) of the Legal Proceedings Act, a court could not grant condonation for the late delivery of the notice since the respondents' claims had prescribed. Accordingly, the High Court should have dismissed the Legal Proceedings Act application.

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[64] AA para 44.6 (V1 p 34); and see Interveners' FA (Annexure SM2) heading (V1 p 75) read with POC paras 1, 8, 10, 11, and 15 (V5 p 476-478).

[65] On the proper approach to statutory interpretation see *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28.

THE RESPONDENTS' CLAIMS ARE BAD IN LAW

45 The State raised and persisted with two exceptions that go to the heart of the respondents' pleaded claims and demonstrate why they are bad in law. They were:

45.1 The **causation exception**:[66] The respondents' particulars of claim do not contain sufficient averments to establish the necessary delictual element of causation.

45.2 The **legal duty exception**:[67] The respondents' particulars of claim do not contain sufficient averments to establish that the State owed the respondents a delictual legal duty to avoid causing the respondents' alleged losses (i.e. the conduct was not delictually wrongful).

46 The approach to exceptions is well established.[68] Suffice it to say that when determining an exception, "*[t]he [pleaded] facts are what must be accepted as correct; not the conclusions of law*."[69] Exceptions provide a "*useful mechanism to weed out cases without legal merit*".[70] They are aimed at avoiding the leading of unnecessary evidence and allow for the disposal of a case in whole or in part expeditiously and cost-effectively.[71] In respect of delictual claims, the courts have often determined the issue of wrongfulness, and, in particular, if there is a legal duty not to cause harm, by way of exception.[72] Because recognising a legal duty not to cause pure economic loss

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[66] Exception, Ground 1, V6 p 507-509 paras 1.1 – 1.5. The High Court upheld the causation exception, but split its inquiry into causation under factual and legal causation headings. Therefore, it bifurcated its order upholding the causation exception to deal separately with each inquiry. High Court judgment paras 32 (V6 p 533), 41 (V6 p 536-537), 42 (V6 p 537), 52 (V6 p 542), and 70 (orders 1 and 2, V6 p 548).

[67] Exception, Ground 2, V5 p 509-512.

[68] See e.g. *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA) (***Hlumisa Investment***) para 22.

[69] *Hlumisa Investment* para 22.

[70] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)* (***Telematrix***) para 3; *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) (***Pretorius***) para 15.

[71] *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 (CPD) 627 at 630; *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706.

[72] See e.g. *Telematrix* paras 2-3; *AB Ventures Limited v Siemens Limited* 2011 (4) SA 614 (SCA) (***AB Ventures***); *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) (***Knop***); *Van Der Bijl and Another v*

generally involves the extension of the law, courts will determine whether such claim is good in law, on exception.[73] And since the plaintiff is not entitled to present a different or stronger case at the hearing than the one pleaded, it must be assumed that the facts alleged represent the "*high-water mark of the factual basis on which the Court will be required to decide the question*."[74]

47 Nevertheless, the respondents have sought to urge this Court, with references to selected cases from this Court (in particular *Fetal Assessment Centre*[75] and *Pretorius*[76]), not to determine whether the particulars of claim are good in law on exception. But these cases do not purport to create any new approach to exceptions. They merely apply the trite principles to the specific circumstances facing this Court.[77] The circumstances in those cases are materially different from the present case. The High Court, having regard to these Constitutional Court cases, therefore, carefully chronicled those differences and correctly concluded that it should determine the exceptions, including the causation exception.[78]

The causation exception

48 Causation is a necessary element of any claim for delictual damages.[79] The causation exception expressly sets out the reasons why the pleaded claims fail to establish causation.[80] That requires a court to determine whether conduct is the factual and legal

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Featherbrooke Estate Home Owners' Association (NPC) 2019 (1) SA 642 (GJ) (***Featherbrooke Estate***) paras 7-8; and *Hlumisa Investment supra*.

[73] See e.g. *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) para 18; *AB Ventures v Siemens Ltd* 2011 (4) SA 614 (SCA) paras 5-9; and *Hlumisa Investment* paras 58-71.

[74] *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318I; *Hlumisa Investment* para 64.

[75] *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) (***Fetal Assessment Centre***).

[76] *Pretorius supra.*

[77] Both *Fetal Assessment Centre* and *Pretorius* refer to and rely on, with approval, the SCA's decisions in relation to exceptions, including *Telematrix*. See *Pretorius* para 15 and *Fetal Assessment Centre* para 10.

[78] High Court judgment paras 35 to 39, V6 p 534-535.

[79] *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) (***Lee***) paras 37-38; *Minister of Police v Skosana* 1977 (1) SA 31 (A) (***Skosana***) at 34E.

[80] Exception ground 1, V6 p 507-509.

cause of the loss.[81] Therefore, the SCA clearly erred in finding that the causation exception was only pleaded as an exception based on the absence of factual causation.[82]

48.1 The exception expressly stated that "*pleadings fail to include sufficient averments to establish that the defendants are the cause of the plaintiffs' alleged losses*".[83]

48.2 This Court[84] and the SCA have confirmed that "*in the law of delict, causation involves two distinct enquiries*": whether the conduct is the factual cause and legal cause of the loss.[85] The factual causation inquiry requires determining whether "*if the wrongful conduct is mentally eliminated and hypothetically replaced with lawful conduct*"[86] the harm would have still arisen. The legal causation inquiry seeks to determine whether the harm is too remote to impose legal liability given legal and public policy considerations.[87]

48.3 The State's causation exception never excluded the legal causation inquiry, nor did it limit the exception to only an absence of factual causation. It simply averred that the pleadings did not establish that the State was the cause of the respondents' losses (and then referenced a number of features of the pleaded claims). That obviously requires an inquiry into both elements of causation.

48.4 Moreover, before the High Court, the respondents (and the Court) correctly

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[81] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd 2009 (2) SA 150 (SCA) (**Fourway Haulage**)* para 30.
[82] SCA judgment para 21, V5 p 466.
[83] V6 p 508, Exception para 1.4, emphasis added.
[84] *Lee* para 38; see also the High Court judgment at paras 40-41, V6 p 536 (relying on *Lee*).
[85] *Fourway Haulage* para 30.
[86] *Gore NO* para 32.
[87] *Lee* paras 38 – 39; *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) para 68; *Fourway Haulage* para 31

understood the exception to cover both legal and factual causation. The matter was argued and dealt with on that basis. This was consistent with the principle that an exception is based on all and any reasonable interpretation of the pleadings.

48.5 The SCA's strained interpretation of, and approach to, the causation exception evidently meant that it did not deal with the exception "*sensibly*". Rather the SCA adopted precisely the "*over-technical approach*" to exceptions which it had previously warned "*destroys their utility*" as "*a useful mechanism to weed out cases without legal merit*".[88]

49 Given its mistaken approach to the nature of the causation exception, the SCA failed to deal with the substantive findings by the High Court, which led the High Court to hold that the respondents had not pleaded sufficient averments to support their allegation that the President's conduct was the cause of the respondents' alleged loss.[89]

50 For the reasons below, these findings are fatal to the respondents' pleaded claims.

51 ***First***, the SCA did not engage with or dispute the High Court's finding that legal causation was absent in relation to all the nineteen Zimbabwean respondents, since, as a matter of legal and public policy, in line with and based on this Court finding in *Kaunda*, "*the South African government bore no liability to pay monetary compensation to non-South African nationals for acts committed outside of South Africa by the government in breach of the Constitution and in violation of international law*".[90] Evidently, this

[88] *Telematrix* para 3.
[89] High Court judgment at para 42, V6 p 537.
[90] High Court judgment at para 45, V6 p 538 - 539, emphasis added, read with paras 46 to 52 (V6 p 539 - 542).

finding, which was a legal determination, ought to have put an end to all nineteen Zimbabwean respondents' claims.

52 It is submitted that either under the causation exception or legal duty exception (since legal causation and wrongfulness involve intertwined means of limiting liability on legal policy grounds[91]), the claims of the nineteen Zimbabwean respondents, were bad in law, given the legal and public policy considerations as found by the High Court.

53 This was so since, as this Court held in *Kaunda*, foreigners lose the benefit of any obligation on the State to protect rights in the Constitution "*when they move beyond our borders*."[92] This is also consistent with this Court's finding in the *Law Society* matter, where this Court drew a distinction between South African citizens on the one hand (who have constitutional rights and SADC Treaty rights) and citizens of other SADC countries on the other (who only have SADC Treaty rights).[93]

54 The respondents have argued that the High Court determination – that the Government bore no liability to foreign nationals for compensation in the current circumstances – was predicated on a decision by the High Court in *Burmilla Trust* (per Tuchten J)[94] – a matter involving a constitutional damages claim (not a delictual claim) in respect of the suspension of the SADC Tribunal – that was subsequently overturned by the SCA. But this submission has no merit.

54.1 In *Burmilla Trust*, the SCA did not overturn Tuchten J's finding of principle (which

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[91] *De Klerk v Minister of Police* 2021 (4) SA 585 (CC) para 17; *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) (per Brand JA) para 35.

[92] See High Court judgment paras 49 and 50, V6 p 540 - 541, and *Kaunda* para 36, emphasis added.

[93] *Law Society* para 29, referred to in High Court judgment para 49, V6 p 540.

[94] *Trustees for the Time Being of the Burmilla Trust and another v President of the Republic of South Africa and another* [2021] 1 All SA 578 (GP) (***Burmilla Trust (GP)***).

supports the finding made by the High Court in the current matter) that "[n]on-South Africans also have rights under the Constitution while they are in the Republic and in respect of acts performed by government actors within its borders. South Africa owes no duties to foreign corporate nationals for acts of and in conducting foreign policy performed outside its borders. In formulating and executing its foreign policy, South Africa is under no legal obligation to have regard to or protect the interests of foreign corporate nationals when they are doing business outside South Africa."[95]

54.2 Rather, the SCA majority in *Burmilla Trust* held that in terms of the facts pleaded in that case, the claim was in fact brought by a South African national.[96] It, therefore, held that "[t]he high court erred in this regard, by failing to recognise that claim A [the main constitutional damages claim] was that of a South African national based on the violation of its own constitutional rights by the respondents."

54.3 The SCA majority in *Burmilla Trust* did not consider this issue further, nor did the SCA minority. Neither the majority nor minority sought to question the principle finding by Tuchten J that as a matter of legal and public policy non-South African nationals would not have a valid claim for damages for the alleged harm caused by the President's conduct of international relations abroad. Instead, the SCA found, as a matter of pleaded fact, that the relevant party claiming constitutional damages, which had instituted a claim against Lesotho before the Tribunal, was South African, not a foreign national. Importantly, in that matter, the SCA did not suggest that if the claim had been brought by a non-

[95] *Burmilla Trust* (GP) para 63, emphasis added.

[96] *Trustees for the time being of the Burmilla Trust and Another v President of the RSA and Another* 2022 (5) SA 78 (SCA) (***Burmilla Trust***) paras 23(a)(v) and 24.

South African national, it would still have had a valid constitutional damages claim against the South African government. Rather, it appears to have implicitly accepted the High Court's findings that no such damages claim would subsist.

54.4 Therefore, nothing in the SCA's judgment undermines the finding by the High Court in this matter,[97] based on Tuchten J's judgment and *Kaunda*.[98]

55 The respondents also seek to rely on *Government of Zimbabwe v Fick*[99] to argue that the State ought to be held liable to pay private law damages to non-South African nationals in the current circumstances. But such reliance is completely inapposite. In *Fick,* this Court developed the common law to allow for the execution, in South Africa, of a SADC Tribunal cost award against the Government of Zimbabwe. It held that it could do this because, given that Zimbabwe was a party to the SADC Treaty (incorporating the Tribunal Protocol), it had waived its state immunity from any domestic enforcement in South Africa of SADC Tribunal decisions.[100] There is no way of interpreting this Court's decision as supporting a private delictual claim in South Africa, not against Zimbabwe (the true pleaded cause of the respondents' losses), which waived its immunity from enforcement, but against the South African Government.

56 ***Second***, the SCA erred in holding that the High Court in the present matter had applied the incorrect test when dealing with whether or not factual causation was properly pleaded[101] and, therefore, failing to engage with the further grounds for why the High Court held that causation was absent.

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[97] High Court judgment para 45 (V6 p 538 – 539), read with para 49 (V6 p 540-541) and para 52 (V6 p 542).
[98] *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235) (CC) (***Kaunda***).
[99] *Government of the Republic of Zimbabwe v Fick & Others* 2013 (5) SA 325 (CC) (***Fick***).
[100] *Fick* paras 32 – 35.
[101] SCA judgment paras 24 and 25, V5 p 468.

57 This Court, in setting out the general principles of causation, stated that the 'but-for' test is ordinarily applied to determine the factual causation and, if 'but for' the wrongdoer's conduct, the harm would probably not have been suffered by the claimant, then the conduct is not the factual cause of the harm.[102] The court must therefore engage in a hypothetical enquiry as to "*what probably would have happened but for the wrongful conduct of the defendant*".[103] This enquiry "*may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis the plaintiff's loss would have ensued or not. <u>If it would in any event, then the wrongful conduct was not the cause of the harm</u>.*"[104]

58 It is clear that the High Court was precisely engaging in the above-mentioned hypothetical enquiry when it stated the following:

> "The notion that may be inferred from the pleaded facts, that the President acted constitutionally, he may have been able to prevent the suspension of the Tribunal by blocking consensus, is a non-sequitur. The SADC Treaty, as I have pointed out, allows for the dissolution of the Tribunal by way of majority vote. Therefore, the President's opposition or absence of his signature to the 2014 Protocol, would not have made any difference as the Tribunal could still have been dissolved, by three-quarters of the heads of State. **As correctly pointed out by counsel for the defendants, whatever the effect the former President's signature of the 2014 Protocol (absent ratification) may be said to have, even on the basis of a joint-wrongdoer as contended for by counsel for the plaintiffs, the Constitutional Court's order that the President must withdraw that signature, <u>which did in fact occur</u>, thwarted the "conspiracy" to curtail the jurisdiction of the Tribunal. Formal ratification of the decision, moreover, in any event, never occurred**. Finally, I am unable to find any allegations pleaded, demonstrating that the action or inaction by only the President of South Africa, being only one member of a body made up of all SADC's heads of state, can be said to be the cause of the suspension of the Tribunal."[105]

59 The SCA failed to consider this hypothetical elimination exercise that the High Court

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[102] *De Klerk v Minister of Police* 2021 (4) SA 585 (CC) para 24; AK v Minister of Police (Centre for Applied Studies and another as amici Curiae) 2022 (11) BCLR 1307 (CC) (***AK v Minister of Police***) para 109.

[103] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (AD) at 700G-H, emphasis added.

[104] Ibid.

[105] High Court judgment para 42, V6 p 537, emphasis added.

engaged in and the evident factual causation test it applied. Consequently, the SCA does not even suggest that any of the High Court's specific findings, as to why factual causation was absent, were incorrect. These included the following findings, which are fatal to the pleaded claim: (a) "*the Constitutional Court's order that the President must withdraw that signature, which did in fact occur, thwarted the "conspiracy" to curtail the jurisdiction of the Tribunal*", and (b) "*the President's opposition or absence of his signature to the 2014 Protocol, would not have made any difference as the Tribunal could still have been dissolved, by three-quarters of the heads of State, which were the predicate for upholding the factual causation except, were incorrect*".[106]

60 The first finding is evidently correct:

60.1 In the *Law Society* matter, this Court accepted that the 2014 Protocol, which limited the Tribunal's jurisdiction, on its own terms, would only become binding and enter into force (thus only at that stage repealing the 2000 Tribunal Protocol) once ratified by the requisite number of states (after signature), and that no state had yet ratified the 2014 Protocol.[107]

60.2 The reason this Court needed to intervene (at the urging of the applicants in that matter), before the ratification of the 2014 Protocol, was precisely to reverse the threat created by the President's initial indication (given his signature), that South Africa intended in due course to become a party (by ratification) to the 2014 Protocol. Thus, this Court expressly accepted that the relief it granted (removal of the signature) would prevent the harm eventuating before the 2014

[106] High Court judgment at para 42, V6 p 537.

[107] *Law Society* para 22. The 2014 Protocol provides, in article 53, that it "shall enter into force thirty (30) days after the deposit of the Instruments of Ratification by two-thirds of the Member States."; and, 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." Available at https://ijrcenter.org/wp-content/uploads/2016/11/New-SADC-Tribunal-Protocol-Signed.pdf.

Protocol was ratified and came into force. In particular, this Court expressly held that: "the President's signature cries out for prompt intervention before the majority required by the Protocol sign, ratify and act on it."[108]

60.3 Therefore, this Court intervened and ordered the President to withdraw his signature from the 2014 Protocol, and the President complied with this Court's order. As a consequence, the 2014 Protocol has never entered into force.

61 The Singapore Court of Appeal has confirmed the High Court's second finding. In a recent case concerning Lesotho's participation in the suspension of the SADC Tribunal, it held that it would have been "*impossible*" for any one country's President, "*acting alone, to have vetoed or prevented*" the dissolution of the SADC Tribunal.[109]

62 Therefore, given the High Court's findings (not disputed on their merits by the SCA), the pleaded claims failed to demonstrate that the President was the factual, alternatively legal, cause of the respondents' losses.

63 ***Third,*** even if the SCA disagreed with the High Court's reasoning in determining the causation exception, it erred in upholding the appeal on that basis alone, rather than by determining, as it was required to do, whether or not the Court's upholding of the causation exception was correct for the further reasons advanced by the State. As the SCA has held, "*whether or not a Court of Appeal agrees with a lower court's reasoning*

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[108] *Law Society* para 41.

[109] See *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2018] SGCA 81 para 142 (As the Court explained: "It is evident from Art 35 that the SADC itself as well as any institution constituted under the SADC Treaty (including the SADC Tribunal) could have been dissolved at any time, as long as three-quarters of all the heads of State at the SADC Summit or three-quarters of all the Member States were to adopt a resolution implementing such a decision.") See also *Law Society* para 52 and Article 35(1) of the SADC Treaty (available at https://www.sadc.int/documents-publications/show/4171), the SADC Treaty allows for the dissolution of the SADC Tribunal by way of majority vote (three-quarters of the Summit's members, who are the heads of state of the SADC member states).

would be of no consequence if the result would remain the same".[110]

64 There are significant further grounds, ignored by the SCA, which also demonstrate that the High Court was correct to uphold the causation exception, at least since legal causation was absent.

64.1 *First*, eighteen of the twenty-five respondents had not instituted any case in the SADC Tribunal against Zimbabwe, and only three of the twenty-five had specifically instituted claims for compensation, which all the respondents now say they would have been entitled to claim from Zimbabwe at the time of the 2011 suspension and the President's signature of the 2014 Protocol.[111] In other words, at the time that the President's conduct in respect of the Tribunal occurred, the vast majority of the respondents were not claimants before the Tribunal. They thus had no vested interest in the Tribunal's continued operation at the time the President's conduct occurred and thus the harm was too remote.

64.2 *Second*, the respondents' particulars of claim demonstrate that the underlying claims that the respondents intended to bring or had brought, were claims against Zimbabwe for harm caused by the Government of Zimbabwe and its agents and officials in Zimbabwe, including Zimbabwe's defiance of past

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[110] *Tecmed Africa (Pty) Ltd v Minister of Health and Another* [2012] 4 All SA 149 (SCA) para 17.

[111] See POC paras 31 to 32, V5 p 481-491, read with Annexures B (2009 Tribunal Award, V3 p 216ff) and C (2008 Tribunal Award, V3 p 241ff, and order at V3 p 298-299). Out of the twenty-five respondents:

(a) Only three of the respondents (the tenth, eleventh, and fifteenth respondents) had sought and obtaining an award that Zimbabwe pay compensation; and

(b) Only another four respondents where party to awards protecting their rights: (a) the seventh, eighth and twentieth respondents, while party to the same claim as the tenth, eleventh, and fifteenth respondents, "had not yet been dispossessed by the Government of Zimbabwe at the time of the SADC Tribunal's award" (para 32(d), V5 p 485ff) and "did not institute their claims at the SADC Tribunal [for compensation for such dispossession] prior to its 2011 suspension and the 2014 Protocol" (para 32(d)(vii), V5 p 486); and (b) the first respondent, while party to a Tribunal Award protecting his rights, had not instituted a claim in the Tribunal for compensation when Zimbabwe violated the Tribunal Award of 14 August 2009, by disposing the first respondent in October 2009 (para 31(d), V5 p 482)).

Tribunal awards.[112] Given these circumstances, it is not the President of South Africa that is the cause of the respondents' loss, but Zimbabwe.

64.3 This is supported by this SCA's judgment in *Government v Von Abo*.[113] In that case, the Court found that any unconstitutional failure by the South African government to offer diplomatic protection to Mr Von Abo (i.e. to assist him in his claim against Zimbabwe in respect of Zimbabwe's expropriation of his property) was not the cause of his loss. Instead, it was Zimbabwe's firm refusal to reconsider its land reform policy that was the true cause of the loss.[114] It was the actions and position taken by the foreign state (Zimbabwe) that were the cause of Mr Von Abo's loss (not South Africa's subsequent failure to assist Mr Von Abo to pursue that claim against Zimbabwe). The Court held that it was "*a completely foreign concept that one state would attract liability in terms of its municipal law (because that is the only law that the respondent could enforce against the appellants) viz-a-viz its own national for the wrongs of another state, committed by that state in another country viz-a-viz the same individual*."[115]

The legal duty exception

65 The legal duty exception is based on the respondents' failure to plead sufficient averments to establish that the State owed them a delictual duty to avoid causing them pure economic loss (i.e. what they allege the SADC Tribunal would have awarded them in the claims against Zimbabwe had they brought these and been successful). Put differently, the pleaded claims do not establish that the President's conduct was delictually wrongful (giving rise to a private law duty to compensate the respondents for

[112] See generally POC paras 30 to 32, V5 p 480-491.
[113] *Government of RSA and Others v Von Abo* 2011 (5) SA 262 (SCA) (***Von Abo***).
[114] *Von Abo* para 33.
[115] *Von Abo* para 31, emphasis added.

the loss caused).

66 There is no general duty to prevent pure economic loss, and in each case where such damages are sought, a court must determine whether, on legal and public policy grounds the facts give rise to a legal duty to avoid such loss.[116] Thus, this Court has held that "*our law is generally reluctant to recognise pure economic loss claims".*[117] In essence, "*[t]he law proceeds from the precautionary premise of excluding liability…for pure economic loss, unless there are good reasons to recognise liability.*"[118]

67 Our courts have never recognised a delictual claim for pure economic loss (or any financial loss) caused by the executive actions of the President, and certainly not in relation to the President's conduct of South Africa's international relations abroad.

68 The High Court correctly accepted that the respondents' damages claims were for pure economic loss (the amount that the SADC Tribunal would order Zimbabwe to pay each of them, had they been successful),[119] and found that on legal and public policy grounds, the State bore no liability to pay damages to non-South African nationals.[120] However, notwithstanding these determinations, it then incorrectly dismissed the State's legal duty exception while correctly upholding the causation exception.

69 However, the High Court granted leave to appeal its dismissal of the legal duty

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[116] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 12.

[117] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) (***Country Cloud***) para 23, emphasis added.

[118] *Featherbrooke Estate* (per Unterhalter J) para 17, emphasis added.

[119] High Court judgment para 4, V6 p 526. The President conduct is not pleaded to have been the cause of any physical harm to the respondents' property or to their person: see *Home Talk* para 1; *Mukheiber v Raath and Another* 1999 (3) SA 1065 (SCA) para 4 and *London and Others v Department of Transport, Roads and Public Works, Northern Cape and Others* [2019] ZASCA 144 para 27.

[120] High Court judgment para 45, V p 538-539.

exception.[121] This is undoubtedly because it was plainly in the interests of justice to grant leave to appeal, since the legal duty exception in this matter is intimately intertwined with the reasons for upholding the causation exception. Indeed, the High Court's findings (particularly in relation to the lack of any liability to pay damages to non-South African nationals for alleged harm caused to them outside South Africa) could equally form the predicate for upholding the absence of a legal duty. This Court has held that in delictual claims, "*there is a subtle relationship between the elements of causation and unlawfulness*".[122] And it has been noted that the "*element of causation (particularly legal causation, which is itself based on policy considerations) is also a mechanism of control in pure economic loss cases that can work in tandem with wrongfulness.*"[123]

70 Similarly, the SCA has held that findings that militate against a finding of wrongfulness may also militate against a finding of legal causation. Therefore, it is not always advisable to deal with such enquiries separately.[124] And the SCA has recently pointed out that "*[l]egal causation is resolved with reference to public policy. For that reason, the elements of legal causation and wrongfulness will frequently overlap.*"[125]

71 Certain of the grounds that the High Court used to uphold the causation exception demonstrate that on the pleaded case, there is no legal duty owed either to all the respondents or at least those who are not South African citizens. Thus, this is a case

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[121] High Court order for leave to appeal at para 2, V4 p 362.

[122] *De Klerk* para 17, see also minority judgment para 150.

[123] *Country Cloud* para 25, emphasis added.

[124] *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) (per Brand JA) para 35 ("*in my view, most of the considerations that served to exclude a finding of wrongfulness in this case will also rule out a finding of legal causation. …* ***Incidentally, I believe that this overlapping militates against the separation of issues in a case such as this***.") (emphasis added).

[125] *Nohour and Another v Minister of Justice and Constitutional Development* 2020 (2) SACR 229 (SCA) para 16.

where "*this overlapping militates against the separation of issues"* of legal causation and wrongfulness (legal duty).[126]

72 Based on the issues set out below (many of which were already dealt with under the causation exception), no legal duty exists in the present matter.

73 ***First***, as discussed above, the High Court (while under the causation inquiry) correctly accepted that, given legal and public considerations, *"the South African government bore no liability to pay monetary compensation to non-South African nationals for acts committed outside of South Africa by the government in breach of the Constitution and in violation of international law."*[127]

74 Therefore, it is submitted that the national executive should not, as a matter of legal and public policy, be held to have a private law duty not to cause economic loss outside South Africa to foreign citizens and companies.

75 ***Second***, the President's conduct at issue in this matter is executive action in conducting South Africa's international relations abroad. The Constitution directly regulates its lawfulness and any remedies for unlawfulness, as held by this Court in the *Law Society* matter. The exercise of the executive power at issue flows directly from the Constitution.[128] Unlike administrative action, no separate Act[129] or other statute or regulations govern this conduct. Indeed, this Court has held that since the negotiating and signing of international treaties is the exercise of executive power, there is no

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[126] *Cape Empowerment Trust* para 35.
[127] High Court judgment at para 45, Vol 6 p 538 -539.
[128] Section 231 of the Constitution, see Law Society paras 74, 78, and 82.
[129] The Promotion of Administrative Justice Act 3 of 2000 (**PAJA**).

obligation on the executive to consult with the public.[130]

76 The Constitution has its own remedial provisions that deal with the unconstitutional exercise of the President's executive actions. Proper accountability for any unconstitutional conduct is covered by public law remedies mandated by section 172 of the Constitution. This allows for relief that is broad, flexible and situation-specific.[131] As occurred in the *Law Society* matter.[132]

77 The Constitution also makes provision for any just and equitable remedy that is deemed appropriate and necessary to correct the unconstitutionality. For instance, in the *Law Society* matter, the parties sought and were granted an order declaring the President's conduct unconstitutional and correcting this conduct by ordering him to withdraw this signature of the 2014 Protocol.[133] This Court held that this was "*the appropriate remedy*" for the President's unconstitutional conduct.[134] Moreover, none of the applicants (including five of the current respondents) in the *Law Society* matter sought compensation as necessary just and equitable relief.

78 The Constitution, therefore, gives a clear indication that unconstitutional conduct of the present sort should be dealt with, as occurred in the *Law Society* matter, by way of public law remedies in terms of section 172 of the Constitution. Thus, it would cause an improper chilling effect, and domestic fiscal cost, if the executive's conduct of

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[130] *Law Society* para 87, and section 231(1) of the Constitution.

[131] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) para 211; *Esorfranki Pipelines (Pty) Ltd v Mopani* 2023 (2) SA 31 (CC) (***Esorfranki***) paras 49-50.

[132] See *Law Society* para 97.

[133] Similarly, in the *Democratic Alliance v Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP), the Government's giving of notice withdrawing South Africa from the Rome Statute of the International Criminal Court was found to be unconstitutional, and the government was ordered to formally revoke the notice of withdrawal (see para 84, order 3).

[134] *Law Society* para 93, read with para 94.

international relations were to give rise to private law claims for damages for pure economic loss to individuals and companies over and above such broad and flexible public law accountability. This is precisely one of those cases where this Court should not "*translate constitutional duties into private law duties enforceable by an action for damages*".[135] This is particularly so, since, as this Court has held, "*the use of private law remedies to claim damages to vindicate public law rights may place heavy financial burdens on the State.*"[136]

79 ***Third***, it is equally clear that no legal duty ought to arise where, as discussed above, the underlying financial losses and violation of rights are alleged to have occurred at the hands of a foreign state in its territory.[137]

80 ***Fourth***, it would not be in keeping with legal and public policy to impose a duty to prevent such alleged losses, which represent hypothetical claims against a foreign state, which had not even been instituted in the SADC Tribunal (as is the case with the vast majority of the respondents' claims, as discussed above).

81 However, the High Court took account of none of the above factors when dismissing the legal duty exception. The limited basis upon which the High Court dismissed the legal duty exception clearly demonstrated a misunderstanding of this Court's decisions in *Steenkamp* and *Law Society*, in the context of the present case, where the issue is whether there is a private law delictual duty on the President in relation to causing economic loss abroad through the executive conduct of international relations.

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[135] *Esorfranki* paras 32 and 33.
[136] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 80.
[137] POC paras 30 to 32, V5 p 480-491.

82 Unlike in *Steenkamp,* the issue is the exercise of the President's executive power as head of state (specifically regulated by the Constitution). Moreover, in the passage from *Steenkamp* that the High Court relies on to dismiss the legal duty exception, this Court simply approves the proposition that "*if an administrative or statutory decision is made in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision, different public policy considerations* ***may well*** *apply*." [138]

83 But, in *Steenkamp*, this Court was not dealing with executive action by the President in terms of the Constitution, but rather with administrative or statutory decisions under specific legislation. And this Court only indicates that different considerations *may* apply. It did not determine what those considerations were. Nor did it suggest that all the other factors which it lists as relevant for determining whether there is a delictual duty[139] become irrelevant in determining whether public policy requires the imposition of a private law duty to pay damages.

84 Therefore, it is important to consider the more recent *Country Cloud* decision. In *Country Cloud*, this Court explained that there may be some level of dishonesty in relation to the state official's conduct, which when it falls short of fraud or a corrupt attempt to obtain illicit gains, would mean that no delictual liability should be imposed. On this basis, this Court accepted that the dishonesty of the state official in that matter did not give rise to delictual liability.[140]

85 This is crucial in the current matter since the respondents do not allege that the President acted fraudulently or corruptly. This means they will not be entitled to make

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[138] *Steenkamp* para 55(b), emphasis added.
[139] *See Steenkamp* para 42.
[140] *Country Cloud* paras 46-47.

out such a case in the trial.[141] As the SCA held in *Home Talk*: "*A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence*."[142]

86 In this case, the respondents merely plead a reference to what this Court held (that the President's exercise of power was not in accordance with the Treaty and in good faith).[143] But, in context, this Court did not make any findings of corruption, fraud, or dishonesty.

87 And although respondents plead that the President failed to act in good faith when he breached section 231 of the Constitution (mimicking the language of this Court),[144] when pleading the fault of the President in relation to their delictual cause of action, the respondents merely allege that the President acted "*acted wrongfully, and unlawfully, and with a deliberate, reckless or grossly negligent disregard for the rights of those affected by the abolition of individual access to the SADC Tribunal, including the plaintiffs*".[145] So they plead that the President's conduct may have been deliberate, it may have been reckless, or it may have been grossly negligent. But they do not plead that the President's conduct was fraudulent or corrupt or otherwise dishonest.

88 Moreover, courts have accepted that a finding that an organ of state has acted in bad

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[141] *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* 2018 (1) SA 391 (SCA) (***Home Talk***) paras 29 to 31.
[142] *Home Talk* para 30, quoting from *Three Rivers District Council v Bank of England (No 3*) [2001] 2 All ER 513 with approval, emphasis added.
[143] POC para 38 read with para 39 (V5 p 494), and see *Law Society* paras 55 and 56.
[144] POC para 39, V5 p 494.
[145] POC para 40, V5 p 494.

faith does not necessarily "*convey imputations of dishonesty or moral obliquity*" but may merely be a permissible way of asserting that the official "*acted for ulterior purposes and, therefore, travelled outside the ambit of its powers*."[146] In the present context, this is the sense meant by this Court in *Law Society*. It noted in passing that the President's decision to sign the 2014 Protocol was not in good faith. But, in context, this Court was merely indicating that because the correct treaty amendment process was not followed, the deviation from the SADC Treaty was not in good faith, in the sense of not being faithful to the terms of the Treaty.

89 This Court did not find that the former President's actions were fraudulent or were meant to allow the obtaining of illicit gain.[147] Indeed, this Court makes clear that it was not even finding that President knowingly acted unlawfully. Rather it held that: "*Whether he realised the profundity of his actions or not, he was effectively renouncing some of the foundational values of our democracy*."[148]

90 In an analogous case, this Court has recently held that "*economic loss sustained as a result of a breach of section 217 – <u>whether or not the breach is intentional</u> – is not recoverable in delict*".[149] It held this to be the case because of the availability of broad and flexible just and equitable relief under PAJA.[150] As discussed above, the same holds true in this matter, where broad and flexible just and equitable relief is available under section 172(1)(b) and was sought in *Law Society*.

91 Finally, the respondents suggest that delictual wrongfulness should be accepted to exist

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[146] *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C), 273.
[147] *Law Society* paras 55 and 56.
[148] *Law Society* para 80.
[149] *Esorfranki* para 50, emphasis added.
[150] *Esorfranki* para 49.

in this matter because of the international law principle of state responsibility.[151] Their suggestion misconceives and misapplies international law. The respondents rely on the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (***ARSIWA***) to suggest that South Africa would owe full reparations to the respondents as a matter of international law. However, ARSIWA makes clear that in international law, responsibility for internationally wrongful acts is owed to other states, not to those states' nationals. That is why it is the other state (either the injured state or another state in certain instances) that must invoke the responsibility.[152] It does not create a private right for individuals against a state. This is why, as this Court has held, in international law, diplomatic protection is exercised by states (at their election) on behalf of their own nationals if it is alleged that those nationals have been injured by the international wrongful actions of another state, not by the nationals themselves.[153]

92 Therefore, there is no basis to suggest that the international law of state responsibility can somehow be used to create a private law domestic delictual duty to compensate foreign nationals who allege they are harmed by South Africa's conduct of international relations. This is not supported by international law, and would indeed lead to limitless liability.

THE LEAVE TO APPEAL SHOULD BE GRANTED

93 The appeal falls squarely within this Court's jurisdiction.[154] As appears from what is set

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[151] AA leave to appeal paras 64 to 67, V6 p 576 – 578.

[152] As the International Law Commission explains in its Commentaries on ARSIWA, the Articles "*define the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States*." p 121, emphasis added (https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf). See also Article 47 of ARSIWA.

[153] See e.g. *Kaunda* paras 29 and 61; *Van Zyl and Others v Government of the Republic of South Africa and Others* 2008 (3) SA 294 (SCA) para 82; *Von Abo* paras 20 to 23.

[154] Section 167(3)(b) of the Constitution.

out above, this is plainly a constitutional matter[155] and raises arguable points of law of general public importance.

94 In the previous sections, we have demonstrated why the State has good prospects of success in its appeal. Below we explain the additional reasons why the interest of justice favour granting leave to appeal.

The High Court's failure to dismiss the respondents' Legal Proceedings Act application is appealable

95 The SCA's determination that the High Court's failure to dismiss the Legal Proceedings Act application was unappealable flowed from an incorrect understanding of the nature of the Legal Proceedings Act application and a failure to have regard to its and this Court's previous jurisprudence in this regard.

95.1 A condonation application under the Legal Proceedings Act is a substantive statutory application to seek a right to institute proceedings. As the SCA has explained, "*an application for condonation under the [Legal Proceedings] Act has nothing to do with non-observance of court procedure, but is for* ***permission to enforce a right, which permission may be granted within prescribed statutory parameters****; and such an application is (in terms of s 3(4)) only* ***necessary if the organ of State relies on*** *a creditor's failure to serve a notice*."[156]

95.2 In a Legal Proceedings Act application, the "*prescribed statutory parameters"* which govern whether the Court can grant permission to institute the claim include that the claimant must satisfy the Court, *inter alia*, that their claim has

[155] See e.g. *Mtokonya* para 9.
[156] *Premier, Western Cape v Lakay* 2012 (2) SA 1 (SCA) para 25, emphasis added.

not prescribed. That is why, as this Court held in *Links* in "*a founding affidavit in support of that application*", the claimant needs "*to deal with prescription because, if his claim had prescribed, condonation would be refused*".[157]

95.3 Therefore, in the Legal Proceedings Act condonation applications (a) courts are required in terms of the Act to determine when the claim to be instituted fell due and whether it has prescribed, and (b) they are able to make these determinations because they are presented with a substantive application with evidence on affidavit.

96 In the present matter, the respondents correctly filed their Legal Proceedings Act application when they first instituted their claims because the State had already indicated that it would argue that their claims were statutorily barred due to the failure to give timeous notice under the Act, as expressly pleaded by the respondents in their particulars of claim.[158] So no special plea was necessary to alert them. The respondents subsequently filed a full application for condonation under the Act (setting out the relevant evidence), which was fully argued and determined by the High Court, with the core issue in dispute being when the respondents' debts became due. They were required to do so since the SCA has made clear that once a claimant "*was **aware** that the [State] relied on upon non-compliance with the provisions of s 3 of the Act…[o]ne would have expected it to bring an application for condonation **immediately***".[159]

97 In the circumstances, the SCA erred when it criticised the High Court for having granted the State leave to appeal against *"the order to the extent that the Court did not grant an*

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[157] *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC) (***Links)*** para 12.
[158] POC paras 47 and 48, V5 p 501.
[159] *Roux Property* para 29, emphasis added.

order dismissing the plaintiffs' condonation application" and the paragraph 5 of its order that "*[n]o order is made as to the costs of the condonation application*", on the basis that no appealable order was made.[160] This is so for a number of reasons.

98 ***First***, an appeal is directed to undo the result of a decision and is thus lodged in respect of the judgment and order itself.[161] In respect of the Legal Proceedings Act application, the State's appeal is directly aimed at undoing the result and order granted. In its answering affidavit, the State prayed for, and was entitled to, an order that the Legal Proceedings Act application be dismissed with costs. That result and order, which would have put an end to the litigation (because of section 3's statutory bar), was not achieved.

99 ***Second***, it is trite that a party can appeal against the failure by the court of first instance to grant the order which it prayed for and was entitled to. For instance, in *Public Protector v President,*[162] this Court was faced with an application for leave to appeal by AmaBhungane in relation to its challenge to the Executive Ethics Code, in circumstances where the High Court had made "*no order in respect of relief sought by AmaBhungane*",[163] *inter alia* because it held that the constitutional challenge was not properly before it.[164] Nevertheless, this Court granted leave to appeal,[165] and determined the appeal,[166] finding that the High Court had erred in not determining the merits of AmaBhungane's application. It, therefore, granted an order setting aside the High Court's dismissal of the application and referred it back to the High Court for determination and ordered the President to pay the costs of opposing AmaBhungane's

[160] SCA judgment para 29, V5 p 470.
[161] *Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (AD) at 354-355.
[162] *Public Protector and Others v President of the Republic of South Africa and Others* 2021 (6) SA 37 (CC).
[163] *Public Protector v President* para 6.
[164] *Public Protector v President* para 141.
[165] *Public Protector v President* para 52.
[166] *Public Protector v President* paras 141 to 145

successful appeal.[167]

100 ***Third***, it is clear that the High Court's judgment and order in respect of the Legal Proceedings Act application is final in effect.

101 There can be no doubt that, having heard a substantive application under the Legal Proceedings Act (and determined the merits), which the respondents were required to and did bring, the High Court held that respondents had complied with the Legal Proceedings Act, because their section 3 Notice was timeously given (since their claims only fell due after this Court granted judgment in *Law Society*). This finally determined whether the respondents were barred by section 3(1) of the Legal Proceedings Act from instituting their claims for want of timeous notice.

102 The SCA in *Jacobs*[168] held that a court determining whether or not an order is final should not only consider its form, but also, and predominantly its effect.

103 The effect of the High Court judgment is final in relation to compliance with the Legal Proceedings Act. To test this, one can ask: would the State now be entitled to file a plea alleging that the respondents' claims are statutorily barred by the Legal Proceedings Act because they failed to give the required six months' notice? The answer must surely be no![169] That very issue was finally determined in a substantive application brought in terms of section 3(4) of the Act (precisely for the purpose of determining that very issue). The application was fully argued and all relevant evidence presented. The High Court determined that the respondents' section 3 Notice was timeously given. Therefore,

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[167] *Public Protector v President* para 149, orders 3, 4, and 5, read with para 148.

[168] *Jacobs and Others v Baumann NO and Others* 2009 (5) SA 432 (SCA) para 9.

[169] At least on the basis of res judicata (issue estoppel) *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* 2014 (5) SA 297 (SCA) paras 10 and 23.

were the State again to seek to dispute this, it would be faced with a defence of *res judicata* or issue estoppel on the basis that the issue had already been determined.

104 ***Fourth***, the SCA also clearly failed to have regard to whether allowing the appeal was in the interests of justice, which is the paramount consideration.[170] It was clearly in the interests of justice for the Court to determine that appeal and dismiss the application with costs. This is so since, as the State submitted, the High Court erred in finding that the respondents' claim only fell due after this Court judgment in *Law Society* was handed down, and therefore condonation was required, but the claims had prescribed. Therefore, the Legal Proceedings Act barred the respondents' claims and condonation could not be granted. The SCA's impermissible approach allows a multi-billion rand damages action to proceed even though it ought to be statutorily barred.

105 ***Fifth***, the SCA erred in criticising the High Court for treating the condonation application as "*an anterior application that required adjudication up-front*" and holding that the High Court would have been better advised not to have entered into the condonation application at that stage of the proceedings.[171]

106 In coming to this finding, the SCA erroneously stated that "*the issue raised therein, namely prescription, neither lent itself to adjudication, nor final determination, on the papers as they stood*."[172]

107 However, in making the above findings, the SCA misunderstood the nature of the Legal

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[170] *Nova Property Group Holdings Ltd And Others V Cobbett And Another* 2016 (4) SA 317 (SCA) (***Nova***) paras 8 to 11 (where the SCA emphasised, at para 8, that the "*interests of justice*" are "*a paramount consideration in deciding whether a judgment is appealable*").

[171] SCA Judgement para 32, V5 p 471.

[172] SCA Judgement para 32, V5 p 471.

Proceedings Act application and disregarded the approach necessitated by the Act, which it and this Court have confirmed in a number of previous decisions. In summary, as indicated above: (a) applications for condonation must be brought forthwith when the State has made it clear that it will rely on non-compliance; and (b) where an application for condonation under the Legal Proceedings Act is brought, the Court must and will determine that application, including the issue of prescription, on the papers in that application which form the pleadings and evidence.[173]

108 For instance, in *Roux Property,*[174] the SCA determined an application for condonation for the late service of a section 3(1) notice on the Minister of Public Works. It held that condonation could not be granted, and the application had to be dismissed, because the claim had prescribed. The SCA determined all the issues, including prescription, on the papers in the condonation application. The SCA took exactly the same approach in *Minister of Police v Masina*.[175]

The SCA erroneously held that the High Court's dismissal of the legal duty exception was not appealable

109 Instead of engaging with the merits of the legal duty exception, or why given the unique circumstances of this case (the intertwined legal policy bases for excluding wrongfulness and causation) it was in the interests of justice to hear the appeal, the SCA merely referenced its decision in *Maize Board* in support of the finding that since the dismissal of an exception does not finally dispose of the issues raised, it is therefore not appealable.[176]

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[173] See e.g. *Roux Property supra.* See also *MEC, Education, Gauteng Province and others v Governing Body, Rivonia Primary School and others* 2013 (6) SA 582 (CC) para 93 (affidavits constitute pleadings and evidence).
[174] *Roux Property supra.*
[175] [2019] ZASCA 24 paras 6 to 17.
[176] SCA judgment para 27, V5 p 469.

110 Adopting such an absolute approach is simply anathema to the flexible interests of justice standard. It pays no regard to the unique circumstances of this case. It impermissibly elevates form over substance. In this regard, the SCA failed to consider its own more recent jurisprudence and that of this Court. All of that jurisprudence establishes that there is no longer an absolute rule as to whether orders that cannot be said to be final in effect are appealable.[177] Rather in each case, the Court must determine whether it is in the interests of justice to allow the appeal.[178]

111 Similarly, this Court has made clear in numerous judgments that the ultimate question of whether a decision is appealable and leave to appeal ought to be granted is the question of the interests of justice. In *Khumalo*,[179] where the applicant sought leave to appeal directly against the High Court's dismissal of an exception, this Court held that whether an appeal may lie against the dismissal of an exception will depend on whether it is in the interests of justice to hear the matter. Two important considerations are the effect of upholding the exception and the importance of determining the constitutional issues raised by the exception.[180] In *Khumalo* this Court granted leave to appeal against the dismissal of an exception because it held it was in the interests of justice to determine the dismissal of that exception.

112 For the reasons set out below, it is crucial for this Court to determine the constitutional issues raised by the exceptions.

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[177] See *Nova* para 8*; Philani-Ma-Afrika and Others v Mailula and Others* 2010 (2) SA 573 (SCA); and *National Commissioner of Police and Another v Gun Owners South Africa* 2020 (6) SA 69 (SCA) para 15.
[178] Ibid.
[179] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) (***Khumalo***).
[180] *Khumalo* para 10.

The interest of justice favour granting leave to appeal

113 The central constitutional issues in dispute relate to whether multi-billion rand damages claims against the State, in respect of the President's actions as head of state in conducting international relations abroad, are barred by the Legal Proceedings Act or bad in law. It is of significant importance that this Court determines these constitutional issues which are crisply raised.

114 Evidently, it is vital to determine whether the Legal Proceedings Act bars the respondents' claims in order to ensure that claims that are statutorily barred do not proceed to trial. As submitted, the determination by the High Court that the respondents had timeously complied with the Legal Proceedings Act is final in effect and not susceptible of alteration by any trial court. Therefore, it is essential that the High Court decision regarding the Legal Proceedings Act application must be set aside and replaced with an order dismissing the application with costs.

115 Similarly, it is essential that the interlinked causation exception (upheld by the High Court) and the legal duty exception (erroneously dismissed by the High Court, notwithstanding its clear findings of constitutional principle) must be determined by this Court. This is so since exceptions are an accepted mechanism to *"weed out cases without any legal merit"*.[181] Unmeritorious damages claims against the State (particularly ones of this scale) ought also to be weeded out by way of exception, *inter alia*, for "*the avoidance of a lengthy and costly trial*".[182] If either of the exceptions is upheld, as the causation exception was by the High Court, and ought to have been by the SCA had it

[181] *Telematrix* para 3.

[182] *MEC, Western Cape Department of Social Development v BE obo JE and Another* 2021 (1) SA 75 (SCA) para 49 (Wallis JA highlighted why an exception to a delictual damages claim against the government ought to have been taken).

properly engaged with the merits of the exception, this would strike at the heart of the respondents' claims, establishing that they had no legal merit.

116 This is no ordinary matter. The State is faced with a case made up of separate claims by twenty-five claimants for the alleged conduct of the Zimbabwean Government, stretching back decades. Its unprecedented breadth, both in subject matter and quantum, will mean that the undertaking of this trial will not only be a significant task, but will implicate matters of international relations and executive action and the conduct of a foreign state and its agents in a foreign country over many years. On their pleaded case, the respondents would effectively ask the trial court to step into the shoes of the SADC Tribunal, and make findings as to the international wrongfulness of a foreign state's and its agents and officials' conduct. Thus effectively dragging a foreign state's conduct before a South African court, even though that foreign state is not party to the claim. If this case, as the State contends, is bad in law or statutorily barred, this Court should say so, rather than allowing a matter of this nature to go to trial unnecessarily.

117 The matter raises questions of significant public importance, which this Court as the ultimate guardian of the Constitution[183] and its "*final arbiter*",[184] should determine. These include, *inter alia*, (a) whether our law recognises delictual damages claims in these circumstances against the Executive after this Court has already granted an effective public remedy that is appropriate; and (b) when claims predicated on unconstitutional conduct of the executive arise and are barred by the Legal Proceedings Act. Given the SCA's disregard for its own and this Court's binding precedent, the matter also raises

[183] See e.g. *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) para 72.
[184] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* 2021 (11) BCLR 1263 (CC) para 1.

issues around the nature and effect of precedent and its implications for the rule of law[185] and the proper approach to granting leave to appeal.

118 This matter is undoubtedly of particular public importance. If the High Court judgment is allowed to stand, it will preclude the State from contending that the Legal Proceedings Act bars the claims. It will also set a binding precedent that litigants and courts may follow, incorrectly, believing that they can await a declaration of unconstitutionality before instituting delictual claims for damages arising from that unconstitutional conduct of the State.

119 Finally, as mentioned previously, there are already a further 52 actions instituted by Zimbabwean farmers and companies seeking additional damages from the State in respect of the President's unconstitutional conduct in relation to the SADC Tribunal. The same legal issues arise in those matters, and the determination of these legal issues in this matter will be determinative of how the State deals with those matters.

120 Therefore, it is imperative and in the interests of justice that this Court determines the appeal and sets aside the SCA judgment.

CONCLUSION

121 The State accordingly seeks an order in terms of its Notice of Application.[186]

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GILBERT MARCUS SC
ANDREAS COUTSOUDIS
HEPHZIBAH RAJAH

State's counsel, Chambers, Sandton and Umhlanga, 10 April 2023

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[185] *Barnard Labuschagne Incorporated v South African Revenue Service and Another* 2022 (5) SA 1 (CC) para 6; *Turnbull-Jackson v Hibiscus Court Municipality* 2014 (6) SA 592 (CC) para 54; *Ruta v Minister of Home Affairs* 2019 (3) BCLR 383 (CC) para 21.
[186] V5 p 384-385.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT case no: 162/2022

In the application for leave to appeal between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First applicant

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Second applicant

and

LUKE TEMBANI First respondent

TWENTY-FOUR OTHERS Second to twenty-fifth respondents

RESPONDENTS' WRITTEN SUBMISSIONS

INDEX

A. Introduction

1. This case concerns claims for compensation by South Africans and other SADC citizens arising from the suppression of the only regional international human rights adjudicator. Their claims were exigible before the SADC Tribunal, but deliberately extinguished by joint action, in which then-President Zuma was a co-perpetrator. The issues are whether it is in the interests of justice for leave to appeal to be granted to hear an exception already heard by the High Court and Supreme Court of Appeal; and, if it is, whether the appeal is to succeed.

2. The trial is set to establish the truth and obtain redress for human rights victims[1] whose compensation claims before the international human rights court for the SADC region had – as this Court held[2] – been abolished unlawfully and not in good faith by the President acting in concert with then-President Mugabe.[3] The Zuma-Magube "masterplan",[4] this Court held, was meant to "render meaningless"[5] recourse in the form of *inter alia* compensation for brutal attacks on the person and property of Mr Tembani *et al*.[6]

3. Demonstrably arising from what this Court has already found it is not in the interests of justice to foreclose on a trial, investigating liability and its redress. In this way averting discovery revealing the extent of the conspiracy between the previous presidents of South

[1] Record vol 6 p 552 para 7.
[2] *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) SA 30 (CC) ("*LSSA v PRSA*").
[3] *LSSA v PRSA supra* at paras 16, 32, 44, 45, 55, 56 and 84.
[4] *LSSA v PRSA supra* at para 44.
[5] *LSSA v PRSA supra* at para 15.
[6] *LSSA v PRSA supra* at paras 14-16 and 44-45; Record vol 6 pp 555-556 para 12 fn 2; Record vol 5 pp 485-487 paras 32(a)(i) to 32(d)(vii).

Africa and Zimbabwe.[7] Especially not prior to the President acquitting himself of the burden of proof to establish prescription in due course as part of a special plea yet to filed. And particularly not in the light of the poor prospects of success, considered below.

4. This Court has confirmed that the President's conduct *directly* resulted in the termination of the SADC Tribunal's jurisdiction.[8] This Court has also already confirmed the unlawfulness and wrongfulness of the President's conduct.[9] Neither of these issues can at this stage in the interest of justice be reconsidered at the instance of the President *qua* exception.[10]

5. This Court's caselaw on exceptions and its judgment in *LSSA v PRSA* are clear. Applying them carefully,[11] the Supreme Court of Appeal correctly, with respect, held that the President's points were not properly appealable.[12] The Supreme Court of Appeal correctly acquitted itself of its duty confirmed by this Court to determine for itself "whether the matter was an appeal against a 'decision' and thus an appeal within its jurisdiction."[13] Thus the President's oblique premise for seeking leave to appeal (namely

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[7] Record vol 6 p 552 para 6; Record vol 2 p 204 para 64, comprising the Full Bench judgment by Mlambo JP, Mngqibisa-Thuli J and Fabricius J (reported s.v. *Law Society of South Africa v President of the Republic of South Africa* [2018] 2 All SA 806 (GP), and confirmed by this Court in *LSSA v PRSA*).
[8] *LSSA v PRSA supra* at para 52.
[9] *LSSA v PRSA supra* at paras 55-56.
[10] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC) at paras 1, 2, 84, 104 and 128.
[11] Record vol 5 pp 462-469 paras 15-27, extensively citing and applying this Court's judgments in especially *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) ("*Pretorius*") and *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) ("*H v FAC*").
[12] Record vol 5 p 469 para 27; Record vol 5 p 470 para 29; Record vol 5 p 472 para 33.
[13] *United Democratic Movement v Lebashe Investment Group (Pty) Ltd* 2023 (1) SA 353 (CC) at para 40. The Court added that the demands of the interests of justice are determined by weighing up all factors applicable to a case, and by evaluating those factors (*id* at paras 34, 35 and 41). The SCA judgment demonstrably considered the particular circumstances closely, holding that permitting the President to ventilate his points in due course is what the circumstances of this case justify (Record vol 5 p 468 para 25; Record vol 5 p 470 para 31). In doing so the SCA correctly applied the binding criteria of the Superior Courts Act 10 of 2013 (Record vol 5 p 469 para 27; Record vol 5 p 470 para 29; Record vol 5 p 472 para 33), "which coincides with a correct application of the 'interests of justice standard" (at Du Plessis "The Proper Test for Appealability" 2022 (3) *TSAR* 438 at 451).

that the Supreme Court of Appeal erred by not considering itself bound by the High Court's order granting leave to appeal)[14] is misconceived.[15]

6. Crucially, the explicit premise underlying the President's application is not tenable. The premise is that the Supreme Court of Appeal's decision predetermines the conditional condonation application.[16] This is demonstrably incorrect. The correct position is that the conditional condonation application was opposed by the President exclusively on the basis of prescription.[17] The President's prescription point *and indeed <u>each</u> of the points raised in the President's two exceptions* were preserved by the Supreme Court of Appeal for determination by "the trial court".[18] The Supreme Court of Appeal's judgment is clear;[19] and its order simply strikes the President cross-appeal from the roll,[20] specifically (as the judgment explains) permitting the President's prescription point being raised properly – per special plea.[21] Thus if there is any merit in any of these defences, then the President will prevail before the proper forum after a proper ventilation of the facts.

7. The dilatory tactic however has been to *resist* the trial (and, with it, any discovery).[22] The interests of justice are not served by terminating a trial prior to its commencement.[23] Nor are the interests of justice served by permitting piecemeal appeals (which is precisely the effect of invoking the nationality of the Tembani litigants in respect of both the

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[14] Record vol 5 p 396 para 26.
[15] *Ibid*, holding that "[t]he High Court's granting leave to appeal did not bind the Supreme Court of Appeal on that issue."
[16] Paras 103 and 114 of the President's written submissions; Record vol 5 p 451 para 136.11.
[17] Record vol 1 p 21 para 6.3; Record vol 1 p 25 para 20.
[18] Record vol 5 p 468 para 25.
[19] Record vol 5 pp 470-471 paras 31-32.
[20] Record vol 5 p 472 para 34(1).
[21] Record vol 5 p 470 para 31.
[22] Record vol 6 p 552 para 6.
[23] *LSSA v PRSA supra* at para 77.

wrongfulness and causation exception, when many of them are South African and many others are in South Africa).[24] Nor in entertaining appeals with poor prospects of success.[25] Instead, the interests of justice require that the trial be permitted to proceed, and a proper ventilation of the issues be facilitated through evidence to be discovered and adduced.[26]

8. Compounding this crucial defect in the application for leave to appeal, the President's case does not even present any arguable point of law – least of all one of general public importance.[27] Not only is each exception element of the President's purported appeal dispositively answered by this Court's judgment in *LSSA v PRSA*. The President's strenuous insistence that this case is unique conflicts with the generality claimed in the fallback on arguability (in its own terms palpably flawed)[28] as basis for leave to appeal.[29]

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[24] *United Democratic Movement v Lebashe Investment Group (Pty) Ltd supra* at para 36.

[25] *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd* 2023 (1) SA 1 (CC) at para 25, confirming most recently that "[t]he prospects of success on the merits play an important part in matters where, like in the present, leave is sought against a decision of the Supreme Court of Appeal."

[26] *Hunter v Financial Sector Conduct Authority* 2018 (6) SA 348 (CC) at para 57; *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) at para 39(e): "Determining the interests of justice entails *inter alia* … whether the matter has already been fully and fairly aired."

[27] On the President's own papers and written argument the uniqueness of this case in any even disqualifies it from presenting an arguable point *of general public importance* which ought to be determined by this Court (Record vol 6 p 554 para 10(b)(ii)).

[28] Record vol 5 p 448 para 134 contends for two bases on which the matter is said to raise issues of wider import. The first is government's liability to "foreign nationals". But the exceptions raised by the President are premised on the absence of a legal duty to *all* claimants, many survivors of whom *are* South African nationals (e.g. the eighth, sixteenth, seventeenth and twenty-third claimants), present in South Africa (e.g. the eighteenth and nineteenth claimants), and in any event SADC citizens (the operative concept used extensively throughout this Court's judgment in *LSSA v PRSA supra* at paras 15, 27, 29, 69, 80, 81, 82, 85). The second basis invoked by the President concerns the question whether the unconstitutionality of "the executive's conduct" only arises "after this Court had pronounced on the unconstitutionality" of such conduct. But this case pertains only to the President's conduct, which under section 167(4) of the Constitution is within this Court's exclusive jurisdiction, and which only this Court can declare unconstitutional before the invalidation has any force or effect (section 167(5) of the Constitution). Thus the generality claimed is, at best for the president, exaggerated in the extreme.

[29] Record vol 5 p 396 para 26.3.

9. Equally untenable is the President's approach to prescription. The President's prescription point is, firstly, contrary to this Court's caselaw on access to justice (which requires an interpretation and application of prescription provisions which gives the fullest possible protection to a claimant's right of access to court), and inconsistent with the special status afforded by the Constitution to the conduct of the President.[30] Secondly, the crucial premise for purporting to appeal this point is misconceived: the High Court's judgment does not have *res iudicata* effect,[31] since the Supreme Court of Appeal specifically substituted the pertinent part of the High Court's order.[32] Thirdly, the prescription point is inconsistent with the President's own pleadings, and the requisite knowledge on the part of the Tembani litigants (and other requirements for prescription to commence and continue running) must be established factually by the President on existing evidence and further evidence yet to be adduced.[33]

10. The evidence currently includes the President's own reliance – on oath – on consensus decision-making. Consensus was *as a fact* required, the President revealed, for the entire "masterplan" culminating in terminating the SADC Tribunal's jurisdiction. Thus President Zuma did not only participate intentionally in the conspiracy to terminate the SADC Tribunal's human rights jurisdiction. He also held up to the last moment the power not only to persuade his peers to abandon the masterplan, but even to veto its implementation.[34] But by signing the Protocol, President Zuma continued what he had

[30] Section 167(5) of the Constitution.
[31] Record vol 5 p 445 para 132.
[32] Record vol 5 p 470 para 31 read with Record vol 5 p 472 para 34(2).
[33] *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC) at paras 24 and 44.
[34] Thus the President's reliance on a Singaporean judgment for the proposition that it would have been impossible for the President "acting alone, to have vetoed or prevented" the dissolution of the Tribunal (para 61 of the President's written submissions, citing *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2018] SGCA 81 at para 142) is untenable. *Swissbourgh v Lesotho* specifically premises its conclusion on the text of art 35 of the Treaty, basing its reasoning on "a matter of interpretation of the SADC Treaty". But the question is

commenced and intended: terminating permanently the Tribunal's human rights jurisdiction.[35] His was not a mere inconsequential signature,[36] as the President argues.[37]

11. Crucially, the President explicitly pleads that his conduct could not and did not complete the Tembani litigants' case of action.[38] The President's exception insists that the Tembani litigants' cause of action is inchoate, because they do not disestablish the possibility of re-instating the Tribunal's jurisdiction.[39] Thus unless and until reinstatement of the Tribunal's jurisdiction becomes "precluded", the cause of action is – the President pleads – incomplete.[40] Prescription does not run again incomplete causes of action.[41] Thus the proper point to take – if it had any merit – would have been the opposite: prematurity (the point previously repudiated by this Court).[42]

12. Therefore the Supreme Court of Appeal correctly did not terminate the Tembani trial prior to its commencement by upholding the President's appeal on this point. That Court explicitly preserved it, permitting the President to pursue prescription – and also his points on causation and wrongfulness – at the appropriate stage of the trial.[43] Thus the President suffers no prejudice: he may attempt to prove his points (in respect of each of

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factual: did the relevant decision-making occur unanimously or not? Just as the Singapore Court could until 2018 have operated under the impression (based on art 35 of the Treaty) that a mere three-quarter majority would suffice to render the desired result, so too could the Tembani litigants have understood the situation. However, the President revealed that as a matter of fact unanimous decision-making was required by the heads of State *inter se* for purposes of making all relevant decisions resulting in the Tribunal's jurisdiction's termination. Therefore the requisite knowledge on the part of each Tembani litigant must be established by the President (who bears the onus) before prescription can operate against such litigant.

[35] *LSSA v PRSA supra* at para 45.
[36] *LSSA v PRSA supra* at para 30.
[37] Para 3 of the President's written submissions.
[38] Record vol 6 pp 508-509 paras 1.4-1.5.
[39] Record vol 6 p 509 para 1.4.5.
[40] Record vol 6 p 509 para 1.4.5.
[41] *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) at para 38.
[42] *LSSA v PRSA supra* at para 42.
[43] Record vol 5 p 470 para 31.

which he bears the onus) at the trial. The interests of justice are served by allowing a trial to proceed while preserving the President's points in their totality.

13. Permitting the trial to proceed is indeed the correct outcome, as this Court confirmed in *H v FAC* and in *Pretorius*.[44] The Supreme Court of Appeal applied these two binding precedents,[45] and also invoked various other important principles and precedents governing exceptions. Not only did the President fail to establish any error in the Supreme Court of Appeal's application of these precedents. The President's application for leave to appeal completely fails to account for (and even refer to) either of these two key cases by this Court. Now, in the President's heads of argument, the remarkable stance is adopted that this Court's crucial caselaw somehow "merely" follows "trite" precedents pronounced in cases like *Colonial Industries* by the High Court in 1920 and the Appellate Division in *Dharumpal* in 1956.[46]

14. This Court's caselaw on exceptions and its crucial judgment in *LSSA v PRSA* (which the Supreme Court of Appeal applied)[47] demonstrate that the Supreme Court of Appeal disposed correctly of the appeal before it; and in any event did so by merely applying existing caselaw (which warrants no further appeal to this Court).[48] This is now

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[44] *Pretorius supra* at para 53; *H v FAC supra* at paras 11-12.
[45] Record vol 5 pp 462-465 paras 15-20.
[46] Para 46 of the President's written submissions, citing *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630 and *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706. Not in a single judgment of this Court has *Colonial Industries* by the Cape Provincial Decision ever been cited, and the single incidental citation of *Dharumpal in passim* was only "[f]or a general discussion of *arbitrio boni viri*" (*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at para 61 fn 12). Not any "principle" remotely relating to exceptions.
[47] See e.g. Record vol 5 p 456 para 1 fn 1; Record vol 5 p 459 para 6 fn 6.
[48] *Booysen v Minister of Safety and Security* 2018 (6) SA 1 (CC) at para 50; *General Council of the Bar of South Africa v Jiba* 2019 (8) BCLR 919 (CC) at para 38; *Numsa obo Dhludhlu v Marley Pipe Systems (SA) (Pty) Ltd* 2023 (1) SA 338 (CC) at para 14.

conclusively confirmed yet further by this Court's most recent disposal of a comparable applicant also lodged by the President.

15. In *Government of the Republic of South Africa & President of the Republic of South Africa v Trustees for the Time Being of the Burmilla Trust & Josias van Zyl* (case CCT 76/22) this Court refused leave to appeal. The *ratio* for this refusal applies equally – if not *a fortiori* – to the current application: it is "not in the interests of justice to grant leave to appeal as, after the refusal of leave to appeal, it is open to the parties to litigate before the High Court." The President's heads of argument correctly do not suggest otherwise, and do not address the consequences of this order for the current application at all. This omission is striking: the inconsistency between the outcome sought here and this Court's ruling in *Burmilla* is left unaddressed because plausibly there is none.

16. Just as in *Burmilla*, it is open to the President to prove his points (in this case prescription, wrongfulness and causation) during such trial – after effecting discovery which will reveal the full extent, intent and incentive of the President's participation in the conspiracy to terminate the SADC Tribunal's human right jurisdiction. That is the rub.

17. Therefore also the application for leave to appeal in the Tembani litigation is (as this Court already confirmed in *Burmilla*) inappropriate and not in the interests of justice. The Tembani litigants therefore ask that the application be dismissed for the reasons outlined above and amplified below. In doing so our submissions follow the scheme set

out in the above index, following the logical sequence in which the issues for consideration arise.[49]

B. This Court's caselaw precludes the application for leave to appeal

18. This case is the sequel to this Court's ground-breaking judgment in *LSSA v PRSA*, which contain crucial factual and legal conclusions framing the current application. The Supreme Court of Appeal's judgment appropriately commences by citing this judgment.

(1) *LSSA v PRSA* establishes, completes and confirms the cause of action

19. As this Court confirmed, the President participated willingly in conduct intended to "eviscerate" accountability for human rights violations, emasculate the Tribunal, render it dysfunctional, strip it of jurisdiction over all individuals' disputes,[50] denying citizens of South Africa and other SADC countries alike access to justice,[51] and accordingly depriving them of pre-existing access to the Tribunal.[52] The President's and his peers' "common"[53] objective in impeding the Tribunal's jurisdiction was "to render meaningless any favourable decision already secured by the individuals against the State where finality or execution has not been achieved".[54] This is, as this Court accepted,

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[49] We accordingly first deal with the jurisdictional question concerning granting leave to appeal (which the President addresses last). Second, we address the President's exceptions (which forms the "merits" of the putative appeal in the event that leave is granted). Third we deal with the Tembani litigants' conditional condonation application (on which no order was even made by either the High Court or the Supreme Court of Appeal). The conditional condonation application must be distinguished from the condonation application filed before this Court. The Tembani litigants' answering affidavit filed in this Court was one day late. A substantive condonation application was filed, but unopposed (and omitted by agreement from the appeal record). We respectfully submit that a proper case for condoning the short delay is established, and that no prejudice was caused to the applicants. We accordingly ask that condonation for the filing of the answering affidavit be granted.

[50] *LSSA v PRSA supra* at para 16.

[51] *LSSA v PRSA supra* at para 15.

[52] *LSSA v PRSA supra* at para 18.

[53] *LSSA v PRSA supra* at para 7.

[54] *LSSA v PRSA supra* at para 15.

"essentially what [*inter alios* Mr Tembani's and some of his co-litigants'] plight is about."[55]

20. This Court confirmed not only the unconstitutionality of the President's intentional conduct intended to create – and indeed *directly* creating – precisely this violation of the Tembani litigants' extant claims and access to the SADC Tribunal. This Court also confirmed that unless and until the President's conduct is ordered by this Court itself to be unconstitutional, it retains full force and effect.[56] This is a consequence of the President's unique constitutional status.[57] Section 167(5) prescribes this consequence only in two instances: legislation, and conduct of the President.

21. The President's purported exercise of section 231 constitutional powers to conclude international agreements remains of full force and effect until and unless this Court confirms its unconstitutionality. Until then no litigant before a lower court can claim immediate payment of a debt derived from the President's unconstitutional conduct.

22. The Court's conclusive conclusions in *LSSA v PRSA* disposes of the President's entire case. They confirm, we reiterate

    (1) the unlawfulness (i.e. wrongfulness) of the President's conduct. The President indeed intended and did destroy all SADC citizens' claims and judgment debts, and their access to pursue claims before the SADC Tribunal. And this was unlawful. It was not unlawful *pro tanto* any of the applicants in the LSSA v PRSA proceedings. It was unlawful and invalid *vis-à-vis* Mr Tembani too (a

[55] *LSSA v PRSA supra* at para 15.
[56] *LSSA v PRSA supra* at para 19.
[57] See e.g. *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para 20.

dispossessed Zimbabwean, who joined with the South African and other SADC litigants, and like many has died during the protracted preliminary proceedings).[58]

(2) the "direct consequence" of the President's intentional conduct was "to effectively dissolve the Tribunal",[59] thus rendering meaningless any favourable decision by the SADC Tribunal. The President's conduct was not ineffectual or inconsequential. It caused the termination of access to the SADC Tribunal and rendered its judgments worthless. This was indeed its intended "direct" consequence. Accordingly causation is incontestable. Yet the issue is pursued.

(3) the Tembani litigants could not proceed with a claim for compensation against the President based on the unlawfulness of his conduct claimed to be perpetrated in the exercise of executive power in conducting South Africa's international relations under section 231(1) of the Constitution until and unless this Court confirms the unconstitutionality of such conduct.

23. It follows that each of the three points in which the President persists are rendered unarguable already by this Court's judgment in *LSSA v PRSA* alone, which establishes and supports the Tembani litigants' cause of action.

24. This Court's authoritative precedents indeed disposes of the President's entire case, rendering not only an appeal devoid of prospects of success but also establishing that this case does not properly fall within this Court's important jurisdiction preserved for deserving cases concerning important issues of law. The President's practice note *a quo* already accepted that no constitutional question of substance existed.[60] Hence no appeal

[58] Record vol 6 p 550 para 1. The same applies to other Tembani litigants too (Record vol 6 p 551 para 1).
[59] *LSSA v PRSA supra* at para 52.
[60] Record vol 6 p 554 para 10(b)(i).

to this Court is warranted. The President's written submissions in this Court now explicitly assert that this is a matter requiring "mere" application of "trite" principles.[61] This the Supreme Court of Appeal already did, correctly applying this Court's key caselaw: *H v Fetal Assessment Centre* ("*H v FAC*") and *Pretorius v Transport Pension Fund* ("*Pretorius*").

(2) *H v FAC* and *Pretorius* articulate the governing principles

25. This Court's crucial caselaw on exceptions is analysed and applied in the Supreme Court of Appeal's judgment, and also addressed in the Tembani litigants' answering affidavit filed in this Court (and treated more fully below in dealing with the merits).[62]

26. In essence, they establish that the points the President purports to appeal to this Court at exception stage are generally not to be determined on exception.[63] For, as *Pretorius* puts it, if a "claim … invoking [a] fundamental right … has not been litigated before", the Court "should not hold – on exception – that the constitutional guarantee … does not extend to the actions of [the defendant] taken in concert with [another]".[64]

27. It was incumbent on the President to establish that it is "necessarily inconceivable under our law" that despite the right vesting in "everyone",[65] no one (not even nationals) can have a claim against the President acting in concert with his Zimbabwean counterpart.[66] The President's complete failure to meet this Court's caselaw to this effect in his founding

[61] Para 47 of the President's written submissions.
[62] Record vol 6 pp 563-565 paras 29-33.
[63] *Pretorius supra* at paras 22 and 42; *H v FAC supra* at para 12.
[64] *Pretorius supra* at para 54.
[65] *Pretorius supra* at para 47.
[66] *H v FAC supra* at para 66, applied explicitly by the SCA in paras 17 and 20 of its judgment.

affidavit (which was required to establish a case for granting leave to appeal) is therefore fatal.[67] It is compounded by the failure to meet these judgments' import in the President's written submissions,[68] particularly since the President's argument (if accepted) necessitates the development of the common law.

28. *H v FAC* confirms the importance of the constitutional injunction to develop the common law.[69] It held that in the ordinary course a court cannot acquit itself appropriately of the constitutional imperative imposed by section 39 of the Constitution to develop the common law *at exception stage*.[70] Especially not in cases where more than merely incremental developments of the common law is required.[71] In such instances "it will normally be better to make a final decision only 'after hearing all the evidence, and the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors."[72] This applies both to wrongfulness and causation.[73]

29. This is, on the President's approach, such a case. The President contends that the Tembani litigants' claims are "novel", "unprecedented",[74] "bad",[75] "never [been] recognised",[76] and "completely inapposite".[77] He contends that the claims cannot qualify

[67] Record vol 6 p 563 para 29.
[68] As mentioned, the President's argument simply retorts that this Court's judgments in *H v FAC* and *Pretorius* "merely" recite "trite" doctrine dating from 1920. See, again, para 46 of the President's written submissions.
[69] *H v FAC supra* at paras 10-26.
[70] *Id* at 78.
[71] *Id* at para 14.
[72] *Ibid*.
[73] *Id* at para 74.
[74] Record vol 1 p 63 para 77.4.3.
[75] Para 45 of the President's written submissions.
[76] Para 67 of the President's written submissions.
[77] Para 55 of the President's written submissions.

as legally cognisible under the common law as it currently stands even after its development by this Court in *Fick*.[78]

30. Hence *H v FAC* and *Pretorius* preclude the President's points being disposed of in his favour at exception stage.

(3) *Fick* defeats the President's exceptions

31. *Fick* impales the President on the horns of a dilemma.

32. This is because *Fick* does one of two things. It either defeats the President's application for requiring (if the President's contentions were to be adopted) the development of the common law, which is (again, as a consequence of the approach for which *the President* contends) to be done by the trial court and to be considered by the Supreme Court of Appeal instead of this Court at first and final instance. Hence the application for leave to appeal falls to be dismissed for failing the interests of justice criterion.[79] Or *Fick* requires, as was indeed done by this Court there, that the common law be developed by this Court, even on its own motion, on appeal (or that an incremental recalibration of the common law be applied post *Fick*).[80] In the latter event the "legal duty" exception and the President's entire reliance on wrongfulness (or the alleged absence thereof) collapse. So too the so-called "legal causation" exception, which the President is at pains to present

[78] Para 55 of the President's written submissions, referring to *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) ("*Fick*").
[79] See e.g. *Tiekiedraai Eiendomme (Pty) Ltd v Shell South Africa Marketing (Pty) Ltd* 2019 (7) BCLR 850 (CC) at para 20; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd supra* at paras 65-67 and 74.
[80] See *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at paras 16-17.

as overlapping,[81] although not pleaded, with the wrongfulness (or "legal duty") exception.

33. On either approach the President enjoys no prospect of success (whether before this Court or in the trial). *Fick* furthermore renders the development of the common law (if this is indeed still necessary in this particular SADC treaty-regime context) in favour of Mr Tembani *et al* a foregone conclusion. Such development is, with respect, a constitutional inevitability in the event that the President's position on the law as it currently stands is to be accepted.

34. This Court held in *Fick* that the SADC Tribunal Protocol imposed an obligation on member states to take all necessary steps to facilitate the enforcement of SADC Tribunal judgment and orders.[82] This obligation arose from the ratification of the SADC Treaty,[83] which is binding on South Africa.[84] South Africa undertook to enforce SADC Tribunal order.[85] However, the common law as it stood did not apply to the Tribunal's orders.[86] Therefore the common law had to be developed – *mero motu*, on appeal by this Court – to enable the enforcement of judgments and orders of international courts and tribunals based on international agreements that are binding on South Africa."[87] Otherwise lawful

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[81] Para 70 of the President's written submissions, citing *Nohour v Minister of Justice and Constitutional Development* 2020 (2) SACR 229 (SCA) at para 16. Yet this judgment holds, firstly, that "legal causation and wrongfulness" must remain conceptually distinct concepts (*ibid*). This correctly implies the need to plead them distinctly (contrary to the approach adopted in the President's exception). Secondly, *Nohour* acknowledges that legal causation must be determined on the facts and evidence (*id* at paras 16-17). This confirms the in-principle inappropriateness of deciding it on exception. Thirdly, *Nohour* recognises that factual causation concerns the inquiry into whether conduct *caused* or *materially contributed* to the loss (*id* at para 27). This correctly gives effect to the flexible *Lee* approach to the "but for" test. Thus *Nohour v Minister of Justice and Constitutional Development* operates against the President threefold.
[82] *Fick supra* at para 33.
[83] *Id* at para 34.
[84] *Id* at para 30.
[85] *Id* at para 48.
[86] *Id* at para 53.
[87] *Id* at para 53.

judgments are evaded with impunity "by any state or person in the global village",[88] to the prejudice not only of South Africa's own citizens but also "foreigners under its jurisdiction".[89]

35. Since article 32 of the Tribunal Protocol commits South Africa in imperative terms to "take forthwith all measures necessary to ensure execution of decision of the Tribunal", the common law had to be developed to empower South African courts to fulfil this obligation.[90] South Africa was "bound", this Court confirmed, "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 Amendment Treaty."[91]

36. The Constitution obliged South Africa to honour its 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."[92] For the Constitution compels the development of the common law in line with the spirit, purport and objects of the Bill of Rights.[93] The rule of law is integral to the SADC Treaty, foundational to the South African Constitution, and constitutive of the fundamental right of access to court.[94] The latter right requires an effective remedy or execution of court orders.[95] Therefore successful SADC litigants must be granted access to South African courts for the enforcement of

[88] *Id* at para 54.
[89] *Id* at para 56.
[90] *Id* at paras 58 and 59.
[91] *Id* at para 59.
[92] *Ibid*.
[93] *Ibid*.
[94] *Id* at para 60.
[95] *Id* at para 61.

orders, particularly those stemming from human rights and rule of law violations provided for in treaties that bind South Africa.[96]

37. Because no law gave effect to this, the Constitution enjoined this Court to either apply or develop the common law to allow the enforcement of SADC Tribunal orders.[97] Since the common law as it stood did not provide for the enforcement of the Tribunal's decision, it required development.[98] "The need to do so is even more pronounced since Zimbabwe, against which an order sanctioned by the Treaty was made by the Tribunal, does, in terms of its Constitution, deny the aggrieved framers access to domestic courts and compensation for expropriated land."[99]

38. This Court stressed South Africa's obligation to facilitate the enforcement of human rights related orders made against a state, including those stemming from the Amended Treaty, in accordance with international instruments which bind South Africa in terms of section 231 of the Constitution.[100] The development of the common law amounted to compliance with the international law obligation to take all measures necessary to ensure the execution of the decisions of the Tribunal.[101] Zimbabwe ***and*** *South Africa* were obliged to cooperate with the Tribunal and assist in executing its judgments against Zimbabwe.[102]

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[96] *Id* at para 62.
[97] *Id* at para 64.
[98] *Ibid*.
[99] *Id* at para 68.
[100] *Id* at para 69.
[101] *Id* at para 69.
[102] *Id* at para 71.

39. Each step in this Court's *ratio* reproduced above equally compels the development of the common law (to the extent that it is still required) to allow a claim for compensation under the circumstances pleaded in the Tembani litigants' particulars of claim.

40. This, then, is the end of any "intertwined" exception based on "legal duty" (i.e. wrongfulness) and causation (even if "legal causation" is to be considered). For the reasons provided by this Court, South Africa is under a Treaty obligation to do whatever is necessary to give effect to Tribunal awards and by extension causes of action based on the Treaty but impeded by our President's participation in terminating the Tribunal's exercise of its requisite jurisdiction.

41. Thus already a preliminary analysis (conducted for purposes of considering prospects of success and other factors bearing on the interests of justice criterion for granting leave to appeal) disposes of the President's application for leave to appeal. This is yet further confirmed when scrutinising the "merits" of the putative appeal, to which we now turn.

C. <u>This Court's caselaw renders the putative appeal unarguable and unmeritorious</u>

42. The standard set by this Court for evaluating exceptions is articulated in *H v FAC*.[103] It held that the correct "test on exception is whether on all possible readings of the facts no cause of action may be made out" at the trial.[104] The excipient must "satisfy the court

[103] 2015 (2) SA 193 (CC).
[104] *Id* at para 10.

that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts."[105]

43. An excipient's burden is particularly exacting in matters where the development of the common law may arise, since it is only when incremental developments of the common law are required that this is a suitable exercise to embark upon at exception stage.[106] In other circumstances the development of the common should be considered only after all the evidence has been led at the trial.[107] It is generally more appropriate to decide issues involving the potential development of the common law at a stage later in the trial,[108] at the end of the plaintiff's case.[109] Otherwise a courts' constitutional obligation under section 39(2) of the Constitution to develop the common law by promoting the spirit, purport and objects of the Bill of Rights might be frustrated.[110] A court must guard against negating important normative implications underlying *inter alia* the constitutional value of accountability which are not amenable to determination on exception, and which should not be determined at the exception stage.[111] Deferring the determination of the issue to the trial stage places a court in a position "to make a final decision … 'after

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[105] *Ibid*, citing *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) at para 36 (to which we shall revert below).
[106] *Id* at para 11-14.
[107] *H v FAC supra* at para 11.
[108] *Id* at para 12, quoting *Harriton v Stephens* (2006) 226 CLR 52 ((2006) 226 ALR 391; (2006) 80 ALJR 791; [2006] HCA 15) at para 35, which holds that "[e]specially in novel claims asserting new legal obligations, the applicable common-law tends to grow out of a full understanding of the facts. To decide the present appeal on abbreviated agreed facts risks inflicting an injustice on the appellant because the colour and content of the obligations relied on may not be proved with sufficient force because of the brevity of the factual premises upon which the claim must be built. Where the law is grappling with a new problem, or is in a state of transition, the facts will often 'help to throw light on the existence of a legal cause of action – specifically a duty of care owed by the defendant to the plaintiff'. Facts may present wrongs. Wrongs often cry out for a remedy. To their cry the common-law may not be indifferent."
[109] *Ibid*. See similarly *Carmichele v Minister of Safety and Security supra* at para 80, explaining that "where the factual situation is complex and the legal position uncertain, the interests of justice will often better be served by the exercise of the discretion that the trial Judge has to refuse absolution".
[110] *H v FAC supra* at para 13.
[111] *Id* at paras 15-16, quoting *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at para 16.

hearing all the evidence, and the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors'."[112] It is only in the exceptional situation when a court can conclude that it is impossible to recognise the claim (irrespective of the facts as they might emerge at the trial), that an exception can be upheld.[113]

44. Entertaining and upholding an exception too readily or prematurely is inconsistent with the Constitution, because it could create "areas of life and law where the values of the Constitution may be ignored."[114] This is *precisely* what the President seeks: immunising illegal conspiracies to terminate accountability before international courts also from civil accountability and responsibility at the instance of human rights victims before domestic courts. The refrain throughout his founding affidavit filed in this Court and in his written submissions is that "international relations" cannot attract a legal duty or constitute a legal cause of loss.[115]

45. This Court repudiated just such approach (both in *H v FAC* and *LSSA v PRSA*),[116] holding that this "is not the kind of choice that our Constitution allows judges to make."[117] Instead, courts "must ensure that the values of the Constitution underlie all law", and there is no "part of the law" which may be permitted to "exist beyond the reach of constitutional values."[118] For "all law must be grounded in constitutional values", and

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[112] *H v FAC supra* at para 14, quoting *Carmichele supra* at para 21.
[113] *H v FAC supra* at para 26.
[114] *Id* at para 23.
[115] See e.g. paras 54.3, 67, 75, 78, 81, 113 and 116 of the President's written submissions; and *inter alia* paras 15, 16, 18, 21, 60 of the President's founding affidavit filed in this Court (Record vol 5 pp 391, 392, 393, 412)
[116] *LSSA v PRSA supra* at paras 89-92, discussing the constitutional constraints on "sound diplomatic relations" and concluding that "considerations of comity and the quest for sound diplomatic relations cannot assist the President in his endeavour to insulate his signature from constitutional invalidation."
[117] *H v FAC supra* at para 23.
[118] *Ibid*.

"considered respect must be given to the fundamental rights set out in the Bill of Rights".[119] Hence courts "must assess the various arguments for and against the recognition of the [novel] claim".[120] In doing so the normative matrix of the Constitution and the Bill of Rights must be applied particularly to the issue of wrongfulness in the common law of delict for purposes of determining whether a claim may be recognised in law.[121]

46. Confirming *Fose* (this Court's key case on delictual damages in a constitutional context concerning a cause of action for damages against a public authority),[122] *H v FAC* held that courts are capable – and constitutionally required – to develop common law rules and recognise new remedies for the infringement of rights.[123] This applies "[e]ven if the conclusion is reached that the limits of our law of delict will be stretched beyond recognition".[124]

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[119] *Id* at para 42. See, too, *id* at para 47. See further *id* at para 49, which reiterates that "our law, including our common law, must conform to the values of the Constitution" and that "its development must promote the 'spirit, purport and objects of the Bill of Rights'" and that this constitutional injunction "is the given starting point for determining the viability of the [novel] claim in the circumstances of this case." This applies particularly since "[o]ur pre-constitutional law of delict is not couched in terms of a duty to protect fundamental rights", but where "many of the interests and rights protected under the common law quite easily translate into what we now recognise as fundamental rights under the Constitution" (*id* at para 51). In this Court referred to its own previous judgment in *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC), in which it was held that the abolition by the legislature of the common-law claim to sue a driver of a motor vehicle for negligent injury implicated the right enshrined in s 12(1)(c) of the Constitution and had to pass muster under the limitations provision of the Bill of Rights." The same demonstrably applies to the effective abolition by executive fiat of an extant claim for assault, eviction and expropriation exigible before the SADC Tribunal.

[120] *Id* at para 42.

[121] *Ibid*.

[122] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at paras 60, 67 and 73.

[123] *H v FAC supra* at 66.

[124] *Ibid*.

47. Thus in order to uphold an exception against a novel claim as disclosing no cause of action a court must be satisfied that the claim is *necessarily inconceivable* under our law as potentially developed under section 39(2) of the Constitution.[125]

48. Applying this approach particularly to the issue of the existence of a delictual "legal duty" (as the President casts it), *H v FAC* held that "[p]art of the established wrongfulness enquiry is to determine whether there has been a breach of a legal duty not to harm the claimant, or whether there has been a breach of the claimant's rights or interests."[126] Accordingly even a violation of a claimant's interest suffices. Wrongfulness demonstrably does not depend on a blackletter "legal duty".

49. Wrongfulness is *not* negated by worn spectres of floodgates and limitless liability. The President repeatedly resorts to the latter,[127] suggesting that the "legal duty" exception (and, indeed, his entire case) could somehow be buttressed by what this Court called a predictable "bogey". *H v FAC* refutes this.[128] In law liability is always limited to the true compensation standard, which precludes over-recovery and over-exposure to liability; and it is therefore not a realistic or legitimate objection.[129] Thus the "multi-billion" spectre raised so repeatedly by the President is misplaced.[130] Particularly since

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[125] *Ibid*.
[126] *Id* at 69.
[127] See e.g. para 9 of the President's written submissions, deploying that common cliché routinely rejected by courts: "floodgates" (deprecated in e.g. *Samancor Holdings (Pty) Ltd v Samancor Chrome Holdings (Pty) Ltd* 2021 (6) SA 380 (SCA) at para 53, per Rogers AJA for a unanimous court). In *AB v Pridwin Preparatory School* 2020 (5) SA 327 (CC) at 182 this Court criticised both the Supreme Court of Appeal and the High Court for rejecting the existence of a legal duty by deploying "a 'floodgates' argument".
[128] *H v FAC supra* at para 70.
[129] *Ibid*.
[130] This is particularly so since in this case 25 claimants involved in vast commercial agricultural enterprises, employing extensive workforce and establishing farm schools for rural children, have lost everything and were reduced to extreme poverty and permanent (and even in some instances eventually *fatal*) injury. The quantum is, in any event, not "multi-billions" but R2 bn. This grand total is based on expert valuation reports, and concerns quantifiable and bankable *bona fide* agricultural business by 25 fulltime career commercial farmers. If the President would wish to prove that the cumulative losses claimed to have been suffered are excessive, then this

quantum is conspicuously one of the *only* aspects not contested in the expansive panoply of exceptions initially taken.

50. This Court further confirmed that similar considerations apply equally to questions of causation at the exception stage. Whether policy considerations militate in favour of or against establishing legal causation is "also an issue that can only properly be determined when all the facts are established at a trial".[131] Hence the alleged intermeshed nature of legal causation and wrongfulness only serves to confirm that no proper exception lies against either of them. This is because litigation like the Tembani litigants' claim (raising, as it does, both "factual and legal considerations") presents "matters not capable of being decided appropriately on exception".[132] What exactly did the President *do* in the conspiracy already found? How malign was the scheme? The trial and discovery procedures the Presidency is set on averting will show.

51. This Court's sequel to *H v FAC* is *Pretorius*,[133] to which we have already referred. It reiterates that "a court … may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts".[134]

52. Citing *H v FAC*, this Court held in *Pretorius* that the dismissal of an exception did not deprive the defendants of the opportunity of raising the same defences in their pleas,

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is to be done by contesting the *calculation* of the quantum (not the in-principle liability for the claim irrespective of its amount to be determined by the trial court).

[131] *H v FAC supra* at para 74.

[132] *Id* at para 78, holding that raising an exception was "not the proper procedure to determine the important factual, legal and policy issues that may have a decisive bearing on whether the common law should be developed … in the particular circumstances of this case." The same applies equally to the current case.

[133] 2019 (2) SA 37 (CC).

[134] *Id* at para 15.

which would facilitate the determination of the merits of the defences after leading evidence at the trial; and that this is "probably, in any event, a better way to determine the potentially complex factual and legal issues involved".[135] This confirms the principle to which we have already referred above: the dismissal of an exception is not appealable.[136] Therefore the Supreme Court of Appeal's approach was indeed correct and the merits are not even reached.

53. The Court cautioned that "exception proceedings are inappropriate to decide the complex factual and legal issues raised by these objections".[137] The unconscionability of a defendant's conduct required trial scrutiny not exception exemption.[138] Accountability cannot be evaded on exception by denying a nexus or relationship between the claimants and the defendants, because the constitutional right in question applied to "everyone".[139]

54. As was the case in *H v FAC*, the *Pretorius* matter involved a "factual situation [which] is complex and the legal position uncertain". Since "more than enough legal uncertainty" existed, the *Pretorius* matter justified being "sent … to trial."[140] Accordingly this Court concluded that the High Court should have dismissed the exception, and it consequently substituted the court *a quo*'s order accordingly.[141]

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[135] *Id* at para 22.
[136] See also *Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA) at para 14, holding that except in cases of an exception to jurisdiction of a court, the dismissal of an exception is not appealable.
[137] *Pretorius supra* at para 42. The objections raised in that case concerned the argument that this Court's judgment in *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 (4) SA 262 (CC) did not apply, which argument the Court held "may eventually be found to have merit".
[138] *Pretorius supra* at para 44.
[139] *Id* at paras 46-47.
[140] *Id* at para 53.
[141] *Id* at paras 54 and 58.3.

55. *H v FAC* also approved a significant judgment by the Supreme Court of Appeal: *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd*.[142] *Children's Resource Centre Trust* confirmed the correct approach to novel claims, and applied the governing principles applicable to exceptions.[143] *Children's Resource Centre Trust* held that if a novel (i.e. unprecedented) claim is "legally plausible", then it "must be determined in the course of the action".[144] This case involves, the President explicitly repeated throughout the litigation, "an unprecedented and novel delictual claim."[145]

56. In *Children's Resource Centre Trust* "a delictual claim [was] based on a novel legal duty not to act negligently."[146] As the Court explained, "[t]he existence of such duty depend on the facts of the case and a range of policy issues".[147] This required that a court be "fully informed in regard to the policy elements".[148] Therefore "the enquiry militates against that decision being taken without evidence".[149]

57. Such decisions are seldom capable of being "taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies."[150] This renders it "impossible to arrive at a conclusion except upon a consideration of *all* the circumstances of the case and of every other relevant factor."[151] Therefore novel and

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[142] 2013 (2) SA 213 (SCA), confirmed in *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC).
[143] *Id* at paras 35-37, acknowledging that "[t]he test on exception is whether on all possible readings of the facts no cause of action is made out. It is for the defendant to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts" (*id* at para 36).
[144] *Id* at para 37.
[145] Para 4 of the President's heads of argument *a quo*. Para 109 of the President's written submissions filed in this Court describes the Tembani litigants' claim as "unique", and para 116 states that it is "unprecedented" and "no ordinary matter" (so much for the "floodgates" to which para 9 of the same document refers).
[146] *Children's Resource Centre Trust supra* at para 37.
[147] *Ibid*.
[148] *Ibid*.
[149] *Ibid*.
[150] *Ibid*, quoting with approval *Minister of Law v Kadir* 1995 (1) SA 303 (A) at 318E-I.
[151] *Ibid*, emphasis in the original.

unprecedented causes of action must be allowed to proceed to trial unless they are legally hopeless.[152] In this case the excipients significantly conceded novelty (as mentioned), and they equally correctly did not contend that the cause of action was hopeless.

58. The Court acknowledged in *Children's Resources Centre Trust* (as this Court previously held in *Fose*, and subsequently confirmed in *H v FAC*) that "judicial creativity" as regards an appropriate constitutional remedy is required. *Children's Resources Centre Trust* held that it is "essential to provide effective relief to those affected by a constitutional breach", citing *Modderklip* – a key case synonymous with damages as remedy to compensate for failures to fulfil a constitutional function.[153]

59. Thus not only this Court's caselaw but also that of the Supreme Court of Appeal operates against the President. Significantly, even the Supreme Court of Appeal's judgment in *Telematrix* (which the President prioritises in his argument before this Court over caselaw by this Court) operates against the President.[154]

60. *Telematrix* confirms that it "is essential for deciding negligence and causation" to take into account "public policy considerations" in the light of "a detailed factual matrix".[155] It held that exceptions must be approached by reading pleadings in their totality.[156] And

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[152] *Children's Resources Centre Trust supra* at para 35.
[153] *Children's Resources Centre Trust supra* at para 87, with reference to *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA). *Modderfontein* was recently applied again by the SCA in a case concerning the local sphere of Government unlawfully removing and destroying homeless people's property. Maya P, as she then was, held for a unanimous Court in *Ngomane v Johannesburg (City)* 2020 (1) SA 52 (SCA) that this conduct breached the constitutional rights to dignity, privacy and not to be deprived of property, and that constitutional damages were an appropriate remedy under sections 38 and 172(1)(a) of the Constitution.
[154] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 (1) SA 461 (SCA).
[155] *Id* at para 2.
[156] *Id* at paras 3 and 10.

it specifically deals with the question of policy considerations in the context of "the negligent causation of pure economic loss" (which the President is at pains to contend, incorrectly, is the correct classification of the Tembani litigants' claim).

61. On the President's approach "public policy considerations" must be determined at the exception stage.[157] This in turn presents, as *Telematrix* puts it, the question whether "the potential defendant should be afforded immunity against a damages claim".[158] Even in the limited circumstances where immunity is warranted (in that case in order to protect the independence of adjudicators)[159] it is lost if the decision is made in bad faith.[160] Then a damages action is indeed available.[161] It is, *Telematrix* itself reiterates, only *negligent* and *bona fide* decisions which warrant impunity and immunity to a defendant – thus divesting the defendant's victim of a remedy.[162]

62. This case concerns intentional conduct which was not *bona fide* but *in fraudem legis*.[163] The President resorted to section 231 constitutional powers for an entirely extraneous purpose: supporting an illegal scheme to terminate the Tribunal's jurisdiction in violation of the SADC Treaty, the Constitution, and the interests of litigants dependent on recourse before South African courts pursuant to this Court's judgment in *Tembani*.[164]

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[157] *Id* at para 13.
[158] *Id* at para 14.
[159] *Id* at para 19.
[160] *Id* at para 26.
[161] *Ibid*.
[162] *Ibid*.
[163] As this Court explained, this "concept refers to something done to circumvent or evade the law" (*Public Protector v Commissioner for SARS* 2022 (1) SA 340 (CC) at para 34 fn 35). As this Court's judgment in *LSSA v PRSA* (*supra* at paras 68, 69, 78 and 81) shows, the President's conduct did just that.
[164] *LSSA v PRSA supra* at paras 68, 69, 78 and 81 holding that whereas "[t]he purpose for the conferment and exercise of the power to amend the Treaty is to do what is in the best interests of the people of SADC", and despite the very "purpose for regulating the power to amend so tightly is to secure the best interests of SADC citizens", and in the teeth of the constitutional "obligation to respect, protect, promote and fulfil the rights in the Bill of Rights (which includes the right of access to justice" and which "does not only find application at a domestic level" but is "inseparable from whatsoever is done in the name of the state, regardless of where and with

(1) Wrongfulness/legal-duty exception

63. In this context wrongfulness cannot responsibly be contested, least of all at exception stage – and less still in purporting to appeal the dismissal of the exception.

64. This Court's judgment in *Steenkamp* further refutes any such attempt.[165] *Steenkamp* concerns the appropriateness of damages in a context of "an honest exercise of a statutory power by an organ of State", acting "in good faith", which may precipitate public policy concerns regarding limitless liability.[166] It confirms that the South Africa government does not enjoy general delictual immunity when performing public functions.[167] Nonetheless, "a negligent statutory breach and resultant loss are not *always* enough to impute delictual liability."[168] Some public functionaries ("adjudicators of disputes") should in the public interest be vested with immunity from damages claims "in respect of their incorrect but honest decisions".[169] But "different public policy considerations may well apply" if "an administrative or statutory decision is made in bad faith *or* under corrupt circumstances *or* completely outside the legitimate scope of the empowering provision."[170]

65. On the facts of the present case two of the above three bases for not affording immunity from damages exist, and have been pleaded.[171] *LSSA v PRSA* conclusively held that the

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whom"), the President "made common cause with other member states in the region to deprive South Africans and citizens from other SADC countries of access to justice, even in circumstances where domestic courts lack the jurisdiction to entertain human rights and rule-of-law-related individual disputes".

[165] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC).

[166] *Id* at para 36.

[167] *Id* at para 37.

[168] *Id* at para 37, emphasis added.

[169] *Id* at para 55(a).

[170] *Id* at para 55(a), emphasis added.

[171] Record vol 5 p 494 para 39.

President did *not* act in good faith, and that the exercise of his power fell outside any legitimate scope of his empowering provision: section 231(1) of the Constitution. Thus already on this basis *Steenkamp* demonstrates that the wrongfulness/legal-duty exception (and any legal causation exception to the same liability-limiting effect) is ill-conceived. This is supported by statute law.[172] It is also consistent with common law rights.[173] The Bill of Rights explicitly preserves such rights and recourse.[174]

66. *Steenkamp* secondly shows the insignificance of the President's reliance on the classification of the Tembani litigants' claims as constituting "pure economic loss" (or variously simply "economic loss").[175] Even if the claim qualifies as such, then this still does not meet the dispositive findings in *LSSA v PRSA* – which complete and confirm a compelling cause of action for damages even if it qualifies as "pure economic loss".

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[172] Section 1 of the State Liability Act 20 of 1957 renders the State's liability as extensive as that of an individual. See Booysen "Succession to Delictual Liability: A Namibian Precedent" XXIV *CILSA* (1991) 204 at 208, citing section 1 of this Act in the specific context of a State's delictual liability for a foreign government's conduct. Booysen further cites *South African Railways and Harbours v Edwards* 1930 AD 3 at 9 as authority for the same principle as it applied under the Act's predecessor (the Crown Liability Act 1 of 1910). Booysen further notes that "[d]elicts committed in terms of municipal law by the South African against individuals in the territory of Namibia prior to its independence" may also "become international delicts as a result of a 'denial of justice' where, for example, the individual cannot enforce his claim through the ordinary judicial process."

[173] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 23G demonstrates (with reference to *Matthews v Young* 1922 AD 492 at 509-510) that under the common law a public authority is not liable for damages provided it acted *bona fide* and in the honest discharge of its duties. Where, however, a resolution was taken "not in pursuance of the duty devolved upon the organ of State, but was "actuated by some indirect or improper motive", liability is *not* excluded (*Matthews v Young supra* at 510). Thus such immunity as might exist operates even under the common law only "in favour of a person who in good faith exercised a power conferred by or under the Act" (*Knop v Johannesburg City Council supra* at 25I). The inquiry is whether "the legislature intend[ed] that an applicant should have a claim for damages in respect of the loss caused by the negligence" (*Knop v Johannesburg City Council supra* at 31D). In this case the question is whether the Constitution (which is the President's empowering regime governing the negotiation and signing of treaties) intended this. The answer is that sections 38 and 172 of the Constitution quite clearly contemplate damages as an available remedy, as Court confirmed (see e.g. *Fose supra* at para 60). The Constitution explicitly excludes damages where it intends immunity from damages (see e.g. sections 71(1)(b), 58(1)(b) and 117(1)(b) of the Constitution). This is not done in section 231(1), which is – as this Court held in *LSSA v PRSA supra* at para 72 – the relevant empowering provision.

[174] Section 39(3) of the Constitution: "the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

[175] *Steenkamp supra* at para 46, holding that it was "unnecessary to decide this matter on the limited basis that the claim of the applicant amounts to pure economic loss and I refrain from expressing an opinion in that regard."

67. Nonetheless, the pure-economic-loss classification vital to the wrongfulness/legal-duty exception is in any event inaccurate. This Court confirmed most recently that "*[c]ulpable conduct which causes harm to persons or property is prima facie wrongful. By contrast, where the conduct causes pure economic loss – that is, where financial loss is caused with no accompanying harm to persons or property – there is no assumption of wrongfulness", in which event "wrongfulness must be positively established*."[176]

68. In this case the plaintiffs' causes of action before the SADC Tribunal had been destroyed by terminating the Tribunal's jurisdiction over causes of action vesting in private parties. This qualifies as property.[177] Therefore the termination of a claim, as this Court held was the President's intention and the direct effect of his conduct, constitutes damage to property.[178] Thus this is *not* a case of pure economic loss, and wrongfulness is accordingly not competently contested. Accordingly this Court's caselaw confirms that

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[176] *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 (2) SA 31 (CC) at para 29. Surprisingly the President's written submissions cites *Esorfranki* in support of the proposition that damages are somehow inappropriate in the current situation. This contention untenable. *Esorfranki* clearly confirms the availability of claims for full monetary compensation (including even loss of profit). It applies the principle of subsidiarity to PAJA reviews and holds that monetary claims must be brought under section 8 of PAJA, not under the common law of delict. PAJA does not apply to the President's conduct constituting the cause of action in the Tembani litigants' claim. Therefore the in-principle compensatory claim contemplated by section 38 and 172 of the Constitution is indeed to be pursued by applying the ordinary common-law legal infrastructure: delictual damages (*Fose supra* at para 60).

[177] *Minister of Defence, Namibia v Mwandinghi* 1991 (3) SA 355 (Nm SC) at 367E-I. See also Booysen *op cit* at 205. As this Court confirmed, property must be construed encompassingly and includes incorporeal rights (*National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at para 63 fn 69). The same applies under international and comparative law. See further Chaskalson *"The property clause: Section 28 of the Constitution"* (1994) *SAJHR* 131 at 132, citing *Kimball Laundry Co v United States* 338 US 1 (1948); *Revere Jamaica Alumina Ltd v Attorney General* (1977) 15 JLR 114; and the Zimbabwean High Court's judgment in *Hewlett v Minister of Finance* 1982 (1) SA 490 (ZS). International law acknowledges that "property" includes all rights with a monetary value (*Libyan American Oil Company v Government of Libya* (1981) 20 ILM 1; 62 ILR 140). South African courts adopted the same approach even prior to the constitutional dispensation (see e.g. *Administrator, Natal v Sibiya* 1992 (4) SA 532 (A) at 539A-B), which now requires that international be considered (section 39(1)(b) and section 233 of the Constitution).

[178] As this Court held in *LSSA supra* at para 80, "individual right of access was immediately frozen when the provisions of art 18 of the Vienna Convention were activated by the President's signature."

"[w]rongfulness" should have been "uncontentious", especially since this case concerns "positive conduct that harms the person or property of another."[179]

69. This is yet further supported by international law.[180] International law clearly recognises the conduct in question as a wrongful act.[181] This Court's judgment in *LSSA v PRSA* satisfies each of the constitutive elements of a wrongful act under international law.[182]

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[179] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) at para 22.

[180] Section 39(1)(b) of the Constitution provides that a court must consider international law in interpreting the Bill of Rights. This obligation was confirmed by this Court in the current context. It held in *LSSA v PRSA supra* at para 4 that the centrality of international law

> "in shaping our democracy is self-evident. For, in truth, it does enjoy well-deserved prominence in the architecture of our constitutional order. Unsurprisingly, because we relied heavily on a wide range of international legal instruments to expose the barbarity and inhumanity of the apartheid system of governance in our push for its eradication. This culminated in that system rightly being declared a crime against humanity by the United Nations, and its demise. And that history informs the critical role that we need international law to play in the development and enrichment of our constitutional jurisprudence and by extension the unarticulated pursuit of good governance follow."

[181] The ILC's articles on the *Responsibility of States for Internationally Wrongful Acts* (2001) sets out the elements of an international wrongful act. Article 2 provides:

> "There is an internationally wrongful act of a State when conduct consisting of an action or omission:
> (a) is attributable to a State under international law; and
> (b) constitutes a breach of an international obligation of the State."

Article 4(1) provides that the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative executive, judicial or any other function …". Article 4(2) provides that "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State."

Article 12 provides:

> "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required by that obligation, regardless of its origin or character."

[182] *LSSA v PRSA supra* at paras 51-55, holding:

> "… Not only do member states undertake not to do anything that could undermine human rights, democracy and the rule of law, but they have also vowed to essentially protect and promote the role of the Tribunal as one of the institutions of SADC created by the Treaty [fn 58 cites articles 4(c), 6 and 6(1) of the SADC Treaty.] Their decision to amend the Treaty through the Protocol evidences a failure to adhere to the provisions or proper meaning of the Treaty.
>
> Our Treaty obligations, which militate against the President's impugned decisions and conduct, stand because the Treaty has never been amended so as to repeal its provisions relating to individual access to the Tribunal, human rights, the rule of law and access to justice. This means that when our President decided to be party to the suspension of the Tribunal and to actually sign the Protocol, he was acting in a manner that undermined our international-law obligations under the Treaty.
>
> … this court has previously observed [in *Fick supra* at para 59] that our country is under an obligation to protect the Tribunal and resist 'any attempt to undermine or subvert' the role and authority of the Tribunal and the obligations that flow from that Treaty. This is the consequence of our duty to fulfil our international-law obligations. And it finds support from art 26 of the Vienna Convention.
>
> This article codifies a pre-existing customary international-law position which in effect is that, in approaching the decisions like rendering the Tribunal dysfunctional, the negotiations to amend the Treaty, and signing the Protocol, the President was required to act in good faith and in a manner consistent with the country's obligation to uphold the spirit, object and purpose of the Treaty. And this he failed to do, thus rendering this conduct unlawful on this ground as well."

International law specifically contemplates the payment of damages to victims of internationally wrongful acts.[183] Therefore, in the light of section 39 of the Constitution it is not open to contend – least of all at the exception stage – that no cause of action exists.[184]

70. The President's argument does not meet this. Having now apparently abandoned the previous arguments advanced in this context (which have been shown to be untenable *a quo*),[185] only two contentions are now posited.[186] Neither is tenable.

71. The first asserts that the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts cannot "create" a "private right for individuals against a state".[187] No authority is provided for this misdirected proposition.[188] Ample

[183] Article 31 of the *Responsibility of States for Internationally Wrongful Acts* provides that the responsible State is obliged to make full reparation for the injury caused by an internationally wrongful act; and injury includes any damage, whether material or moral. Article 34 provides that full reparation shall take the form of restitution, compensation and satisfaction, either singly or in combination. Article 36 provides that a State responsible for an internationally wrongful act must compensate for the damages caused, and that compensation must cover any financially assessable damage including loss of profits insofar as it is established. Article 37 provides that where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

[184] See further *Fick supra* at para 28 and *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 192 on the constitutional compulsion to consider international law.

[185] Previously the President argued that his conduct was "not the direct cause of the harm-causing conduct" (para 36.2.2 of the President's High Court heads of argument).

[186] Para 91 of the President's written submissions filed in this Court.

[187] Para 91 of the President's written submissions filed in this Court.

[188] It is misdirected, because the question is not whether the ILC's Articles "create" a domestic cause of action. The question is whether international law supports a conclusion of wrongfulness. It does. Courts have indeed "allowed individuals to rely on international obligations not granting [i.e. creating] a right or even an express benefit", and have "found that even though a rule may not have been created with the intention to create a private right of action, such a right can be inferred from the *ius cogens* nature of that rule" (Nollkaemper *National Courts and the International Rule of Law* (OUP, Oxford 2012) at 105). As Nollkaemper (*op cit* at 168) explains, "[e]venthough sometimes domestic law offers all that international law requires, or in some cases more, in other cases the remedies available under domestic law for a violation of an international obligation may fall short of what international law may require. In such cases international law may influence and, to some extent, even determine national remedies." This serves to show how "international law and national law interlock in a way … that can further the interests of the protection of the rule of law as it applies to both the national and the international legal order" (*ibid*). See similarly *id* at 213

authority exists supporting the Tembani litigants' position.[189] International law indeed supports either the recognition of a common law claim as the common law currently stands,[190] or an appropriate development of the common law to recognise liability in the circumstances of this case.[191] Under international law the question whether a person has a right to a particular remedy is primarily determined by treaty interpretation.[192] The SADC Treaty provides that member states shall take all necessary steps to accord this Treaty the force of national law.[193] It imposes an explicit obligation on all member states to cooperate with – not frustrate, obstruct, or destruct – the SADC Tribunal.[194]

72. In interpreting and applying the relevant SADC conventions,[195] this Court's judgment in *Tembani* (to which we have already referred above in this context) definitively

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[189] See e.g. the American Law Institute's Restatement of the Law 3rd *Foreign Relations* [906], stating that "a private person, whether natural or juridical, injured by a violation of an international obligation by a state, may bring a claim against that state … in a court … of that state pursuant to its law". See also the judgment by the German Court of Appeals of Cologne case no. 7 U8/04 (28 July 2005) (2005) NJW 2860, cited in Nollkaemper *op cit* at 111 as an example from positive law confirming that "while the obligation to provide reparation under international humanitarian law only applies between states, this does not take away the possibility for individuals to claim compensation under domestic German law." Similarly the US government itself formally accepted that at least some violations of human rights give rise to a judicially enforceable remedy before domestic courts (*Filartiga and Filartiga v Pena-Irala* 630 F2d 876 (2d Cir 1980); ILDC 681 (US 1980)).

[190] As the African Commission on Human and Peoples' Right confirmed in *Zimbabwe Human Rights NGO Forum/Zimbabwe* communication no. 245 (2002) at para 171, conferring immunity violates international human rights laws protecting the rights of "every person". These obligations are imposed on states and are for the protection of natural or juridical persons. States' "obligations are at least threefold: to respect, to ensure and to fulfil the rights under international human rights treaties. A State complies with the obligation to respect the recognized rights by not violating them. To ensure is to take the requisite steps, in accordance with its constitutional process and the provisions of relevant treaty (in this case the African Charter), to adopt such legislative or other measures which are necessary to give effect to these rights. To fulfil the rights means that any person whose rights are violated would have an effective remedy as rights without remedies have little value. Article 1 of the African Charter requires States to ensure that effective and enforceable remedies are available to individuals".

[191] Nollkaemper *op cit* at 108, citing *Beaumartin v France* (App no. 15287/89) (1994) Series A no. 296-B at para 28 and *Posti and Rahko v Finland* (App no. 27824/95) ECHR 2002-VII at para 53 for the principle that "the right of access to a court may require that the substance of the obligation is capable of being challenged by a person before a court. An example is the right to compensation as protected under international law [*Beaumartin v France* (App no. 15287/89) (1994) Series A no. 296-B at para 28]".

[192] Nollkaemper *op cit* at 182.

[193] Article 6(5) of the SADC Treaty.

[194] Articles 6(6) read with Article 9(1)(g) of the SADC Treaty.

[195] Including the Protocol on the SADC Tribunal and the SADC Treaty itself.

demonstrates the effect of these binding treaty obligations. International and comparative law confirms that this is indeed, with respect, correct:[196] if a convention is law applicable in legal proceedings before a forum against the forum state, then this renders redundant any query concerning the existence of a cause of action based on the binding treaty obligation.[197] And "when a national court has made a finding that the state has acted in breach of an international obligation", then this establishes "an internationally wrongful act" which is the equivalent of having "acted 'wrongfully' under domestic law (whether tort law, administrative law, constitutional law, or criminal law)."[198]

73. In such cases "all the conditions of international responsibility are satisfied".[199] Domestic courts can and indeed do implement international responsibility by ordering compensation in such situations, as is done "routinely"[200] by domestic courts of state parties to the closely comparable European regional integration regime (on which the SADC treaty regime is modelled).[201]

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[196] Nollkaemper *op cit* at 167: "the highest courts of several states that have had to address allegations of the forum state's actual or possible involvement in a breach of international law have considered and applied principles of international responsibility, including the fundamental principle that a breach of an obligation engages the international responsibility of a state, principles of attribution, the principle of state 'complicity', the principles of reparation, compensation, interests, and principles relating to aggravated responsibility."

[197] Nollkaemper *op cit* at 111, quoting Justice Breyer in *Sanchez-Llamas (Moise) v Oregon* 548 US 331, 126 SCt 2669 (2006); ILDC 697 (US 2006): "The parties also agreed that we need not decide whether the Convention creates 'private rights of action,' i.e. a private right that would allow an individual to bring a lawsuit for enforcement of the Convention for damages based on its violation. Rather, the question here is whether the Convention provides, in these cases, law applicable in legal proceedings that might have been brought irrespective of the Vienna Convention claim, here an ordinary criminal appeal and an ordinary postconviction proceeding."

[198] Nollkaemper *op cit* at 169.

[199] *Ibid*.

[200] *Id* at 208.

[201] See e.g. Saurombe "The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis" 2013 (17) *Law Democracy & Development* 457.

74. Similarly, the second contention advanced in respect of international law is also flawed. It concerns the President's reliance on *Kaunda*, which is also invoked in the context of causation. We accordingly address it in that context.

(2) <u>Causation exception</u>

75. The causation exception is eviscerated by *LSSA v PRSA*, belied by *Lee*, unaided by *Von Abo*, and contra-indicated by *Kaunda*.

76. Firstly, and most shortly, *LSSA v PRSA* found conclusively that a "direct" nexus between the President's conduct and the Tribunal's terminated jurisdiction exists.[202] It is his conduct which rendered the Tribunal "effectively as good as dissolved."[203] By the President's signature "individual right of access was immediately frozen".[204] Thus this Court emphatically found causation.[205]

77. Secondly, *Lee* more elaborately confirms the same conclusion.[206] It stands for the fundamental that causation cannot create a clawback from constitutionally-required accountability.[207]

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[202] *LSSA v PRSA supra* at para 52.
[203] *Ibid*.
[204] *Id* at para 80.
[205] *Id* at para 84, holding that the President "effectively emasculated the Tribunal in disregard for our international-law obligation to protect and promote its role. Measuring the President's conduct on the scale of our Constitution, this court's jurisprudence and our international-law obligations, he acted contrary to his constitutional obligations and exercised his s 231(1) powers in an impermissible manner."
[206] *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) ("*Lee*").
[207] *Id* at para 64, holding that the State's duty to protect people coupled with the constitutional norm of accountability require recognition of a legal duty, and this must not be defeated by an inflexible approach to causation – otherwise no effective remedy will ever be available to victims of rights violations.

78. *Lee* held that flexibility has pre-constitutionally already been the appropriate approach to causation, and is post-constitutionally the correct approach especially in cases concerning concurrent causes (or joint-wrongdoers, or conspirators cumulatively causing the loss).[208] It articulates the correct test: the inquiry is simply whether "the wrongful conduct was *probably* a cause of the loss".[209]

79. *Lee* accordingly confirms that the true inquiry is into *the more probable cause*,[210] and that the correct question to ask is what would a responsible authority have done and whether the claimant would have stood a better chance of not suffering loss had the authority exercised public powers accordingly.[211] It is not required that a plaintiff must eliminate or exclude the result altogether;[212] it suffices if the risk of loss would have been reduced by proper conduct on the part of the defendant.[213] Thus the correct approach to causation is to not apply it with inflexibility disqualifying one of multiple sources (or causes, or actors) if the same result could have occurred by operation of other sources, causes or co-perpetrators.[214]

80. *Lee* also emphasises the need to distinguish between factual and legal causation,[215] cautions against contaminating inquiries into factual causation with normative policy considerations to be considered under the wrongfulness element,[216] confirms that contentions concerning the "cause" (in contradistinction to "remoteness") relates to

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[208] *Lee supra* at paras 41, 45, 46 and 49.
[209] *Lee supra* at para 47, approving *Minister of Finance v Gore* NO 2007 (1) SA 111 (SCA) at para 33. *Gore*, in turn, quotes *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 24.
[210] *Lee supra* at para 55.
[211] *Id* at para 58.
[212] *Id* at paras 42-43.
[213] *Id* at para 60.
[214] *Id* at para 63.
[215] *Id* at para 51.
[216] *Id* at paras 53 and 74.

factual causation alone (not also legal causation),[217] and demonstrates that a court is not seized of an inquiry into legal causation when "but for" (i.e. factual) causation is criticised in an exception or plea.[218]

81. *Lee* lays down the law: legal causation cannot countermand the constitutional compulsion to give effect to the rule of law and constitutional values (including accountability), which militate in favour of visiting delictual liability on wrongdoers, require compensation for victims, and reject tendentious "limitless liability" contentions invoked particularly on behalf of governments.[219] Significantly, *Lee* specifically contemplates the development of the common law in circumstances where even the flexibility inherent in a correct application of the "but for" causation test fails to render a constitutionally-compatible result which holds government to account and compensates victims appropriately.[220]

82. *Lee* accordingly directly defeats the President's arguments on causation.

83. *Kaunda* concerned the question whether a right to diplomatic protection existed which could be invoked to compel the South African government to come to the aid of individuals incarcerated in Zimbabwe pending an extradition to Equatorial Guinea.[221] The inquiry turned on the *presence* of the individuals, who were *not* <u>in</u> South Africa.[222]

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[217] *Id* at paras 48 and 69, approving *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 914F-915G, which quotes *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34F-35D, 43D-44F for the "two distinct enquiries" into (i) the "cause" of the loss; and (ii) whether and to what extent the defendant should be held liable for such loss, which concerns "the question of the remoteness of damage". It is the former which involves "factual causation" and the latter which involves "legal causation".
[218] *Id* at para 68.
[219] *Id* at paras 68-70.
[220] *Id* at para 72.
[221] *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at para 30.
[222] *Id* at paras 36-37.

Thus the *ratio* turned on neither their nationality nor the locality of the State conduct, and this is consistent with compelling comparative caselaw.[223] Hence the President's attempt to attribute to Tuchten J's judgment in *Burmilla Trust* a correct application of or reliance on *Kaunda* is incorrect.[224] The High Court judgment in *Burmilla Trust* demonstrably does not assist the President.[225]

84. In this case various of the Tembani "foreign" litigants are in fact present in South Africa, and they will indeed be in South Africa while litigating before the courts of South Africa. Furthermore, unlike in *Kaunda*, the Tembani litigants will not be requiring the Government of South Africa to attempt to persuade Zimbabwe to apply South African law in Zimbabwe.[226] Demonstrably this case concerns (unlike *Kaunda*)[227] no interference

[223] *S v Likanyi* 2017 (3) NR 771 (SC) at para 8 in which he Chief Justice of Namibia held (for a unanimous Full Court, Damaseb DCJ, Smuts JA, Mokgoro AJA and Frank AJA concurring) that the Namibian Constitution's entrenchment of the rule of law that a participation in a violation of international law and national law cannot be overlook on the basis that the Executive's "lawlessness [occurred] beyond the frontiers of its own jurisdiction" (quoting with approval *S v Mushwena* 2004 NR 276 (SC) at 286I and Lord Bridge in *Bennet v HM Advocate* 1995 SLT 510). In *Bennet* Lord Bridge held that it would be a "wholly inadequate response for the court to hold that the only remedy lies in civil proceedings" at the instance of the victim of the illegality. This clearly contemplates that a civil suit for damages is indeed available to a victim of a violations of international law perpetrated abroad.
[224] Para 54.4 of the President's written submissions.
[225] In *Trustees for the Time Being of the Burmilla Trust v President of the Republic of South Africa* [2021] 1 All SA 578 (GP) Tuchten J held that the particulars of claim "do not establish legal causation" in relation to his own claim for monetary compensation (*id* at paras 66-67). This confuses legal causation and wrongfulness. Wrongfulness was already conclusively found by this Court in *LSSA v PRSA*. Unlike the Tembani litigants, neither Mr Josias van Zyl nor any other beneficiary in the *Burmilla* matter was involved in the *LSSA v PRSA* litigation. Nor where they in any manner involved in the preceding litigation intended to be rendered meaningless by the masterplan. Therefore Tuchten J's finding that the Burmilla litigants could not establish legal causation cannot conceivably operate against the Tembani litigants. Both wrongfulness and causation have been confirmed conclusively by this Court *apropos* the Tembani litigants. Tuchten J upheld an exception based on the lack of a causal link between alleged loss and breach of the Constitution in *Burmilla* because the SCA had already found in *Swissbourgh* and subsequent litigation that the Burmilla litigants had no claims (*id* at para 50). The converse applies to the Tembani litigants. Finally, *Burmilla* presupposes that the President's conduct of foreign policy or international relations may permissibly – and even at times unavoidably – prejudice foreigners. However, now that this Court found that the President's conduct was not a legitimate exercise of section 231(1) constitutional powers, and declared it unconstitutional and unlawful, the High Court's treatment of presidential conduct as valid cannot conceivably assist the President. All that this demonstrates is that the Tembani litigants indeed needed this Court's declaration to complete their cause of action – prior to which (and even, incorrectly, thereafter) the High Court could not cognise of the illegality of the putative exercise of constitutional powers by the President.
[226] *Kaunda supra* at para 44.
[227] *Id* at para 44.

with the sovereignty of another State, because South African law is not applied to or in the foreign State against that State.[228] In this case South African law is to be applied by South African courts in South Africa against the South African government.

85. This is precisely what *Kaunda* explicitly contemplated: justiciability of Government conduct perpetrated abroad before a South African court.[229] It reiterated that irrespective of any doctrinal disputes concerning the object or subject of protection under international law on diplomatic protection, in substance the true beneficiary of international human rights law are individuals, not States.[230] Accordingly South African courts remain responsible to control government conduct even in exercising international foreign affairs falling in the sensitive political field of diplomatic protection.[231]

86. It follows that *Kaunda* cannot assist the President in the current case.

87. Finally, the same applies to *Von Abo*.[232] It involved a failure by Government to extend diplomatic protection. But this omission was not the cause of the loss suffered, because even had Government attempted to act, this would have failed.[233]

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[228] In *Kaunda* the Court's concern was precisely this: "In the present case the actors responsible for the action against which the applicants demand protection from the South African government are all actors in the employ of sovereign States over whom our government has no control. The laws to which objection is taken are the laws of foreign States who are entitled to demand that they be respected by everyone within their territorial jurisdiction, and also by other States. The applicants have no right to demand that the government take action to prevent those laws being applied to them" (*id* at para 57).
[229] *Id* at para 45.
[230] *Id* at para 64.
[231] *Id* at para 78.
[232] See paras 64.3 of the President's written submissions.
[233] See e.g. *Von Abo supra* at para 33.

88. Diplomatic protection depended on the host state (Zimbabwe) acting favourably on a request by the sending state (South Africa).[234] Zimbabwe's inevitable refusal to act favourably on any notional request by South Africa to protect Mr Von Abo was established by extensive evidence.[235] Not on exception prior to leading and ventilating evidence.

89. Moreover, *Von Abo* concerned the payment of damages for a breach by Zimbabwe, and not by South Africa.[236] Since no right to claim and obtain diplomatic protection exists, no claim for damages against South Africa could rest on such non-entitlement.[237] Conversely, in this case the cause of action is the President's own conduct abrogating extant or available claims before an international court.

90. Therefore none of the President's arguments is sustainable. Accordingly the Supreme Court of Appeal's order is unassailable. As *Lee* confirms, the Supreme Court of Appeal correctly held that the High Court's entertaining of a legal causation exception was untenable.[238] The exception involving causation indeed only raised factual causation.[239] Each of its constitutive parts is untenable.[240] As in *Lee*, no legal causation issue was

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[234] *Von Abo supra* at para 21, describing the position at a high level to "illustrate that diplomatic protection is not merely for the asking". See, too, *id* at para 26: "the nature and essence of diplomatic protection is a process the result of which is necessarily dependent on the responses of another state."
[235] *Von Abo supra* at paras 26 and 33.
[236] *Von Abo supra* at para 31.
[237] *Kaunda v President of the Republic of South Africa supra* at para 67; *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) at para 52.
[238] *Lee supra* at paras 48 and 69.
[239] The exclusive bases on which the excipients criticised the particulars of claim's averments on causation are those identified in the exception (Record vol 6 p 508-509 paras 1.4.1-1.4.7). They are reproduced in the High Court's judgment (Record vol 5 pp 533-534 para 34). Each of these concerns factual causation. They relate to issues of fact; not remoteness (i.e. the limitation of liability or legal causation).
[240] The first (Record vol 6 p 508 para 1.4.1) is flawed since it is not required to plead or to prove that the President singlehandedly brough by his signature the Protocol "into force". The second (Record vol 6 p 508 para 1.4.2) is flawed because the court order to "withdraw his [the President's] signature" did not in fact result in the restoration of the Tribunal's jurisdiction or the plaintiffs' causes of action (and the judgment is clear that it was not the Court's intention to prescribe to the President the correct corrective conduct to adopt); the Tribunal remains, as

before court.[241] Nevertheless, even if legal causation had been properly before court, then *Lee* disposes of it: legal causation is not a tool to be applied by a court to claw back constitutional accountability, extend immunity, and deny a remedy.

91. Crucially, since the President himself revealed in his answering papers filed in the *LSSA v PRSA* proceedings that all pertinent decisions were in fact (despite the legal position reflected in the Treaty and Protocol provisions on which the Tembani litigants were justified to rely) taken by consent, the President's participation did clearly – even on the most positivist application of the "but for" test – cause the Tribunal's demise. And at the very least his non-participation would have rendered that result less likely. This suffices for purposes of establishing causation.[242]

D. The conditional condonation application

92. The President's revelation (in his answering papers during the *LSSA v PRSA* litigation) concerning consensus decision-making coupled with his persistence that a cause of action

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the particulars of claim plead, inaccessible to the plaintiffs The third (Record vol 6 p 508 para 1.4.3) is flawed because ratification is not a requirement to achieve the *factual* effect of the President's conduct; his participation in, and implementation of, the "masterplan" to – *de facto* (but illegally) – debilitate the Tribunal from exercising its jurisdiction, which indeed occurred (as this Court confirmed) as a fact, was not dependent on Parliament's ratification; and non-ratification is, as this Court further confirmed, "not necessarily dispositive of its [the Protocol's] consequentiality after being signed" (*LSSA v PRSA supra* at para 22). The fourth (Record vol 6 p 509 para 1.4.4) is flawed for the same reasons affecting the first. The fifth (Record vol 6 p 509 para 1.4.5) is flawed because the improbable prospect of the Summit suddenly "lifting the suspension" is not a potentiality required to be excluded in the particulars of claim; at best for the President such contingency is required to be established in a plea in mitigation by the defendants. The sixth (Record vol 6 p 509 para 1.4.6) is flawed because the cause of action is the President of South Africa's own conduct in destroying a claim before the SADC Tribunal, not the illegal confiscation of farms by Zimbabwe. The seventh (Record vol 6 p 509 para 1.4.7) is flawed because each plaintiffs would – as the particulars of claim plead (Record vol 5 p 482 para 31(d)-(e); Record vol 5 p 483 para 32(b)(v)-(vi); Record vol 5 p 485 para 32(d)(iv)-(v); Record vol 5 pp 485-486 para 32(d)(vi)-(vii); Record vol 5 pp 487-488 para 32(e)(vi)-(vii); Record vol 5 p 489 para 32(f)(vi)-(vii)) – have instituted Tribunal proceedings successfully *but for* the President's conduct, which (as this Court confirmed) was intended to "ensure that the Tribunal would not function" (Record vol 5 p 481 para 31(b), read with Record vol52 p 495 para 39A).

[241] *Feldman NO v EMI Music SA (Pty) Ltd* 2010 (1) SA 1 (SCA) at para 7: "[a]n excipient is obliged to confine his complaint to the stated grounds of his exception."

[242] *Lee supra* at paras 58 and 60.

is not completed until it is established that the SADC Summit (of which each SADC State's president is a member) renders his reliance on prescription astounding. Yet, it is exclusively his persistence on prescription which is the only ground of opposition to the explicitly *conditional* condonation application brought on an expressly *ex abundante* basis. Hence the Supreme Court of Appeal deferred the inquiry – turning entirely as it does – on the question of prescription, and not on any other basis for requiring condonation under the Institution of Legal Proceedings against Certain Organs of State Act ("the Act"), to the special plea stage (which is when prescription is to be determined).[243] No prejudice to the President or Government is occasioned, and no other statutory ground of opposition is invoked on their part.

93. The President's prescription point is extremely problematic to prove. He bears the full burden to do so. Factually it is now established that although the Tembani litigants were in law entitled to assume decision-making on the basis as required under the SADC Treaty, the masterplan was indeed adopted unanimously – and so too every decision pursuant thereto. How and when and whether the Tembani litigants had to know of this fact – which on the President's case is constitutive of a competent cause of action – is to be proved by the President for purposes of succeeding in his prescription point.

94. His point is factually fraught and legally flawed. The President contends that "[p]rescription begins to run when a litigant becomes aware, or ought reasonably to have become aware, of the minimum facts that are necessary to institute action".[244] This is inconsistent which this Court's confirmation that prescription commences running as

[243] Act 40 of 2002.
[244] Record vol 1 p 52 para 71.2.

soon as the debt is due.[245] This position is now well-established,[246] and applies equally under the Act – which must be interpretated and applied in a manner maximising access to court.[247]

95. It is indeed clear from a consistent line of this Court's cases that "prescription … implicates the right of access to court entrenched in section 34 of the Constitution".[248] It is accordingly incumbent on a court to interpret and apply the provisions of the Act and the Prescription Act in a manner which best promotes the right of access to court,[249] and to adopt "a purposive, constitutionally compliant interpretation".[250]

96. The President's position is directly inconsistent with this constitutional principle. His stance also contradicts a long line of cases preceding the Constitution and confirmed post-constitutionally based on this Court's judgment in *Mdeyide*.[251] They hold that a debt is due when it is immediately claimable by the creditor and immediately payable by the

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[245] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus* 2018 (1) SA 38 (CC) at para 46. Similarly, in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd supra* at para 100 Cameron J (writing for the majority) explained and confirmed the well-established legal position as follows: "the date on which a debt becomes 'due' may not coincide with the date on which it arises. There is a difference between the debt coming into existence, and the date on which it becomes 'due'."

[246] The Supreme Court of Appeal applied the same approach in *inter alia Botha v Standard Bank of South Africa Ltd* 2019 (6) SA 388 (SCA) at para 30.

[247] *Mabaso v National Commissioner of Police* 2020 (2) SA 375 (SCA) at para 20, holding – based on now well-established caselaw by this Court – in dealing specifically with section 3 of the Act that

> "A resolution of the present dispute requires a consideration of a proper construction of s 3 of the Act, read contextually. The principles which should inform that exercise are trite. The starting point is the Constitution. It commands courts in s 39(2), when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. Courts must also adopt a generous and purposive approach as explained in *Ferreira* para 46."

[248] *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) at para 9; *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at paras 87-90; *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus supra* at para 22; *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* 2021 (3) SA 1 (CC) at para 17; *Links v MEC, Health supra* at para 22; *Road Accident Fund v Mdeyide infra* at paras 1-2.

[249] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) at paras 46-47; *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) at para 28; *Makate supra* at para 87; *Pickfords supra* at paras 34-37 and 47.

[250] *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited supra* at para 39.

[251] *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) at para 13.

debtor.[252] A creditor must "[i]n order to be able to institute an action for the recovery of a debt … have a complete cause of action in respect of it."[253] A cause of action means "every fact which it would be necessary for the plaintiff to prove ... in order to support his right to judgment of the Court."[254] It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action.[255] And a "cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action."[256] Prior to every element necessary to prove and support the claimant's "right to judgment", a claimant is not in a position to institute an action and prescription accordingly cannot commence running.[257]

97. The invalidity of the President's signature is a necessary element which the Tembani litigants must prove in order to support their right to judgment in their damages action. Absent its invalidation a High Court is by operation of the separation of powers and its specific manifestation in section 167(5) of the Constitution inevitably set to approach the trial as Tuchten J did in *Burmilla* by treating the President's exercise of constitutional power and the fulfilment of his constitutional obligations as constitutionally valid, extant and lawful (i.e. not wrongful).[258] The trial court itself cannot make the requisite

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[252] *The Master v IL Back & Co Ltd* 1983 (1) SA 986 (A) at 1004F; *Umgeni Water v Mshengu* [2010] 2 All SA 505 (SCA) at para 5; *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA); *Minister of Public Works v Roux Property Fund (Pty) Ltd* [2020] ZASCA 119 at para 22.
[253] *Umgeni Water v Mshengu supra* at para 6.
[254] *Ibid*.
[255] *Ibid*.
[256] *Id* at para 6, citing *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838 (and the cases collected therein by Corbett JA) and *Truter v Deysel* 2006 (4) SA 168 (SCA) at paras 16, 18 and 19.
[257] *Ibid*.
[258] Thus section 167(5) of the Constitution entrenches a unique President/Parliament-specific presumption of constitutionality which can only be rebutted by a declaration of invalidity by this Court. Whereas comparative courts have recognised a more general presumption of constitutionality under other constitutions (see e.g. Gubbay CJ's judgment in *In re Munhumeso* 1995 (1) SA 551 (ZS) at 558I-559B/C and *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1984 (2) SA 778 (ZS) at 783A-D), the South African Constitution preserved for

wrongfulness finding, because only this Court can determine whether the President has failed to fulfil a constitutional obligation.[259] Prior to a declaration of unconstitutionality by this Court, any assertion or even order of invalidity has no force.[260] Hence the President's conduct remains extant, operative, in force, and enjoys constitutional validity (and therefore cannot under the common law be considered wrongful).

98. Such conduct stays extant and remains existing in law and in fact by explicit constitutional compulsion. Thus the ordinary principle applicable to the exercise of public power by an organ of State (namely that it "exist in fact and may have legal consequences", even if the action in question is grossly in error)[261] applies *a fortiori*. As this Court confirmed in *Kirland*,[262] in such circumstances "[t]he solution is to challenge the decision on review".[263] Not by trial proceedings; not by lodging a damages action.

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this Court the power to pronounce on Presidential conduct and his fulfilment or otherwise of constitutional obligations.

[259] Section 167(4)(e) of the Constitution.

[260] Section 176(5) of the Constitution.

[261] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) at para 90. The same principle underlies *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at paras 44-46, in which this Court referred specifically to Baxter's exposition of the theoretical dilemma discussed by Forsyth (to which the Supreme Court of Appeal, in turn, referred in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).

[262] In *Kirland* this Court confirmed the SCA's judgment in *Oudekraal*. *Oudekraal*, in turn, rests on a *dictum* by the House of Lords in *Smith v East Elloe Rural District Council* [1956] AC 736 (HL) at 871G-H. More recently this Court reaffirmed this *dictum* in *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO* 2020 (4) SA 375 (CC) at para 35. The *dictum* in *Smith v East Elloe* reads in pertinent part: "[u]nless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset it will remain as effective for its ostensible purpose as the most impeccable of orders." Hence the validity of the conduct in question could not be second-guessed unless and until the necessary legal proceedings had been taken. In this case such proceedings involve a declaration of invalidity by this Court. As it held in *Magnificent Mile*, the *Kirland/Oudekraal* principle applies to extant administrative action which had not first been set aside (*id* at para 45). This applies, we submit, especially and peculiarly to action by the President by virtue of sections 167(5) and 172(2)(a) of the Constitution. The *Magnificent Mile* majority judgment continued by explaining that the rule of law and constitutional supremacy precluded private persons from following their own views on the validity of extant administrative action (*id* at para 50). And it confirms that the existence of such action is a status which applies "in fact" (*id* at para 51). Thus the President's argument that conclusions of law are irrelevant for purposes of prescription misses, also for this reason, the point.

[263] *Kirland supra* at para 90.

99. Unless and until the necessary review proceedings succeed,[264] the conduct stands as a matter of fact.[265] Invalid action may therefore not simply be ignored (whether by Government or "the subject").[266] They remain valid and effectual, and continue to have legal consequences, until set aside in judicial proceedings.[267] No litigant or court can ignore the existence of the President's conduct, which must be treated as constitutionally valid.[268] Therefore, unless and until this Court makes the requisite declaration under sections 167(5) and 172(2)(a) of the Constitution, no cause of action based on the validity of the President's conduct exists.

100. Compensation clearly cannot be claimed immediately before obtaining the requisite declaration from this Court. Accordingly the debt is not due prior to such declaration. Accordingly prescription cannot even *commence* running.

101. But even had it been otherwise, then on the facts of this case any running prescription has in any event been interrupted under section 15(1) of the Prescription Act.[269] The legal position is clear and well-established.[270] Even service on the debtor of process whereby the creditor claims *not* the payment of money but merely declaratory relief relating to the

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[264] *Id* at para 100.
[265] *Id* at para 92.
[266] *Id* at para 101, quoting approvingly *Oudekraal supra* at para 26. See similarly *Magnificent Mile supra* at para 58; *Aquila Steel (South Africa) (Pty) Ltd v Minister of Mineral Resources* 2019 (3) SA 621 (CC) at para 96.
[267] *Kirland supra* at para 101.
[268] *Njongi supra* at para 44, quoting approvingly Baxter *Administrative Law* (Juta, Cape Town 1984) at 355 referring to the presumption of validity and the effect of unimpugned exercises of public power.
[269] *Peter Taylor & Associates v Bell Estates (Pty) Ltd* 2014 (2) SA 312 (SCA), confirming *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C).
[270] It has most recently been confirmed and applied by the SCA *in Rademeyer v Ferreira* [2022] ZASCA 92 (17 June 2022) at paras 17-18, holding that "if the declaratory order was to succeed and damages claims after that were instituted, although the relief sought in the two sets of proceedings would be different, both claims would be based on the same cause of action"; therefore the former constitutes a step in the enforcement of a claim for payment of a debt, serving to interrupt the running of prescription.

same cause of action interrupts prescription.[271] This principle operates widely,[272] and has been applied in a comparative constitutional context by the Supreme Court of Namibia in review proceedings.[273] It operates even in circumstances where "the plaintiffs had not claimed money, but had merely claimed a declarator", and where "[t]he summons in question had therefore not been one for 'payment of the debt' within the meaning of s 15(1) of the [Prescription] Act."[274]

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[271] *Cape Town Municipality v Allianz Insurance Co Ltd supra* (per Howie J, as he then was), holding

> "Bearing in mind that some of the key wording of s 15 must be given a wide and general meaning, consistent with a legislative intention to speak broadly rather than to define, and having regard to the spirit, scope and purpose of the Act, I conclude that s 15 must be interpreted as follows.
>
> 1. It is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun thereunder are instituted as a step in the enforcement of a claim for payment of the debt.
> 2. A creditor prosecutes his claim under that process to final, executable judgment, not only when the process and the judgment constitute the beginning and end of the same action, but also where the process initiates an action, judgment in which finally disposes of some elements of the claim, and where the remaining elements are disposed of in a supplementary action instituted pursuant to and dependent upon that judgment.
>
> I am fortified in interpreting thus by what was said in the *Murray & Roberts* case *supra* [*Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A)] at 578 *in fine*:
>
> > 'Where the creditor takes judicial steps to recover the debt, and thereby to remove all uncertainty about its existence, prescription should obviously not continue running while the law takes its course.'
>
> Those are admittedly general remarks, but they point, in my view, to the sense and purpose which s 15 must have in the whole context of prescription law."

[272] See Joubert *et al* (eds) *The Law of South Africa* 2nd ed (LexisNexis, Durban 2010) vol 21 at para 131, citing *Desai v Desai* 1996 (1) SA 141(A) at 147H-I.

[273] *Lisse v Minister of Health and Social Services* 2015 (2) NR 381 (SC) at para 39 per per Maritz JA (Strydom and O'Regan AJJA concurring), citing *Allianz* and this Court's judgments in *inter alia Njongi* and *Mdeyide*, and the SCA's judgment in *Peter Taylor*, and concluding that "the launch of the administrative review proceedings by the appellant had the effect of interrupting the running of prescription as provided for in section 15 of the Prescription Act."

[274] *Huyser v Quicksure (Pty) Ltd* 2017 (4) SA 546 (GP) at para 35. See similarly *Waverley Blankets Ltd v Shoprite Checkers (Pty) Ltd* 2002 (4) SA 166 (C) at 174E-H, confirming (as Howie J held in *Allianz*) that it is indeed sufficient for purposes of interrupting prescription that the process served starts proceedings as a step in the enforcement of a claim for payment of the debt. This was further confirmed by this Court in *Huyser supra* at 560B-C. It is thus "open to the plaintiff to prove its case on the merits and to secure a final judgment" (*Waverley Blankets supra* at 174I), and doing so would stave off prescription. In *Peter Taylor supra* and *Nativa Manufacturing (Pty) Ltd v Keymax Investments 125 (Pty) Ltd* 2020 (1) SA 235 (GP) it was held that *Waverley Blankets* and *Huyser v Quicksure* incorrectly applied *Allianz* to the procedural issue of joinder, and that what was required under *Allianz* was that "there must be some overlapping cause of action" (*Nativa Manufacturing supra* at para 13). The same does not apply to the Tembani litigants, because their prior litigation did not relate to procedural prerequisites (like joinder), but substantive issues (the constitutionality and validity of the President's signature) and sought substantive relief (in the form of a declaration of unconstitutionality and invalidity of the President's signature) which disposes of an element of the ultimate claim for payment of the debt.

102. The principle applies where "the judgment in the action for the declarators would finally dispose of some elements of the claim", despite the fact that "the remaining elements [are] to be disposed of in a supplementary action."[275] It accordingly also applies where proceedings for a declaratory order precipitated "further proceedings in order to secure an order for payment", and the "finding establishing liability" would be "an essential link between that process and the final executable judgment, notwithstanding that some further process will be required to initiate the supplementary proceedings."[276]

103. Therefore, where – as here – previous proceedings "were aimed at securing final determination of an essential element, if not the most essential element, of the claim",[277] prescription is indeed stayed or interrupted under section 15 of the Prescription Act. Similarly section 15 operates in favour of a litigant where – as in this case – "the selfsame cause of action as that which would found any subsequent related litigation aimed specifically at obtaining an order for payment of money" is lodged.[278]

104. The President's suggestion that Saner's authorial "submission" somehow answers the Tembani litigants' reliance on section 167(5) of the Constitution is misplaced. Saner provides no analysis and certainly does not even consider conduct by the President and the status of presidential action under the Constitution. The correct approach is indicated by this Court's caselaw: applying the Prescription Act with the pro-section 34 predilection constitutionally required, and affording full reign to common-law and judge-

[275] *Peter Taylor supra* at para 12. This judgment confirms that the principle articulated in *Allianz* applies unless "it cannot be said that that judgment in the joinder application [or, we submit, a similar preliminary procedural application] … 'finally disposes of some elements of the claim'"; or "the cause of action in the joinder application [ditto] and the claim for damages have nothing in common" (*id* at para 16).
[276] *Allianz supra* at 333H-J.
[277] *Id* at 334D/E-E.
[278] *Id* at 334E-E/F.

made law (like Howie J's luminary judgment in *Allianz*, which notes the "general" nature of the principle it articulates, and the intention to give effect to the "spirit, scope and purpose of the Act" – which must in the current constitutional context be imbued with constitutional considerations the most important of which is broadening access to justice) to fulfil constitutional requirements.[279]

105. Similarly, the suggestion that the review proceedings preceding the current action cannot qualify as process preventing prescription's completion is untenable. This is, firstly, because section 15 of the Prescription Act must (like any other prescription provision) be interpreted and applied in a manner which gives the fullest possible effect to the right of access to justice; hence to preserve a claim by restricting the operation of prescription. Secondly, the Namibian Supreme Court already demonstrated that the *Allianz* principle clearly can and does apply to preceding review proceedings.[280] Thirdly, the suggestion that damages had to be claimed in the initial notice of motion in the review proceedings fails to appreciate the proper approach to prayers formulated in section 172 constitutional litigation. Neither the Court nor litigants can be constricted by the relief as formulated in the notice of motion, because the Constitution requires that just and equitable and effective relief be granted.[281] Effective relief requires compensation for the Tembani litigants' claims before the SADC Tribunal now that it has become clear that the President

[279] See e.g. *Tshwane City v Link Africa* 2015 (6) SA 440 (CC) at para 100.
[280] See, again, *Lisse v Minister of Health and Social Services supra* at para 39.
[281] *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 243: this Court's "power to grant a just and equitable order in terms of s 172(1)(b) of the Constitution 'is so wide and flexible' that courts are empowered to grant relief that has not been pleaded." *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) at para 211: "The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution."

has done nothing to comply with his positive duty under the SADC Treaty and the South African Constitution to facilitate the Tribunal's jurisdiction's reinstatement.

E. Conclusion

106. The President's application for leave to appeal is fatally defective *inter alia* for failing to refer and respond to this Court's conclusive judgments in *H v FAC* and *Pretorius*, which the Supreme Court of Appeal correctly applied. His written submissions reflect that this and other defects in the President's case cannot be overcome, highlighting the multiple flaws on which the applicants' case rests. Contrary to the refrain throughout his written submissions, the President did not merely "append" his signature and did not simply participate in any legitimate "international relations". As *LSSA v PRSA* confirms, he supported an illegal scheme to terminate the Tribunal's jurisdiction; acted in violation of the treaties governing the international relations in question; without any legitimate intention to serve the purpose of the power conferred by section 231 of the Constitution or the treaty regime; instead, intent on rendering existing claims before the Tribunal "meaningless" and "ensuring" that no SADC citizen (including those whose domestic courts' jurisdiction had already been ousted) could ever exercise the right of access to court before the SADC Tribunal to enforce the rule of law and obtain relief for vicious and violent human rights abuses. As a direct result, the Tembani litigants have been rendered destitute, and require compensation.

107. Accordingly the application for leave to appeal, alternatively the appeal (if leave is granted), falls to be dismissed. The ordinary costs order in constitutional litigation should follow, and should include the costs of two counsel.

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24 April 2023