CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 67/18

In the matter between:

LAW SOCIETY OF SOUTH AFRICA	First Applicant
LUKE MUNYANDU TEMBANI	Second Applicant
BENJAMIN JOHN FREETH	Third Applicant
RICHARD THOMAS ETHEREDGE	Fourth Applicant
CHRISTOPHER MELLISH JARRET	Fifth Applicant
TENGWE ESTATE (PVT) LIMITED	Sixth Applicant
FRANCE FARM (PVT) LIMITED	Seventh Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Third Respondent
and	
SOUTHERN AFRICA LITIGATION CENTRE	First Amicus Curiae
CENTRE FOR APPLIED LEGAL STUDIES	Second Amicus Curiae

Neutral citation: *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 50

Coram: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J

Judgments: Mogoeng CJ majority [1] to [97]
Cameron and Froneman JJ concurring: [98] to [105]

Heard on: 30 August 2018

Decided on: 11 December 2018

Summary: Constitution — sections 231, 232, 7(1)-(2), 8(1) — Prematurity — constitutionality of the President's signing of the 2014 Protocol — suspension of the SADC Tribunal — removal of individuals' access to the Tribunal — access to justice

SADC Treaty — articles 18 and 26 of Vienna Convention — customary international law — international law obligations — unlawfulness, procedural irrationality

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ORDER

On application for confirmation of the order of the High Court of South Africa, Gauteng Division, Pretoria:

1. The order of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria on 1 March 2018 in case number 20382/2015 is confirmed in these terms:

    1.1 The President's participation in the decision-making process and his own decision to suspend the operations of the Southern

African Development Community Tribunal is unconstitutional, unlawful and irrational.

1.2 The President's signature of the 2014 Protocol on the Tribunal in the Southern African Development Community is unconstitutional, unlawful and irrational.

1.3 The President is directed to withdraw his signature from the 2014 Protocol.

1.4 The President must pay costs to the applicants, including the costs of two counsel.

1.5 There will be no costs payable to the Southern Africa Litigation Centre and the Centre for Applied Legal Studies.

2. In this Court, the President must pay costs to the first to seventh applicants, including the costs of two counsel.

JUDGMENT

MOGOENG CJ (Basson AJ, Dlodlo AJ, Goliath AJ, Khampepe J, and Theron J concurring):

Introduction

[1] The executive in contradistinction to a ceremonial Presidency of any nation is a repository of extensive powers. And that is a vital requirement for good governance to be a real possibility. For the Head of State and Head of the Executive must of necessity wield enormous power for the effective and efficient coordination of government and State business.[1]

[1] See for example, *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) (*EFF*) at para 20; *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) (*Masetlha*) at para 77; *Premier, Province of Mpumalanga v Executive Committee Association of*

[2] More importantly, the effective leadership or stewardship of the State can never be undertaken by a weakened or lame duck President. The magnitude of presidential responsibilities demands that the incumbent be clothed with sufficient governance-enabling authority to be the critical difference-maker and transformation-agent that national aspirations demand of the office.[2] The President should, therefore, not be unnecessarily constrained in the exercise of constitutional powers. Properly contextualised, this was the message sought to be conveyed through this Court's statement:

> "[A] court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly."[3]

[3] But this is not to be understood as an endorsement of, or a solicitation for a licence to exercise presidential or executive powers in an unguided or unbridled way. All presidential or executive powers must always be exercised in a way that is consistent with the supreme law of the Republic and its scheme, as well as the spirit, purport and objects of the Bill of Rights, our domestic legislative and international law obligations. Our President is never at large to exercise power that has not been duly assigned. Crucially, public power must always be exercised within constitutional bounds and in the best interests of all our people.

[4] Returning to international law, its centrality 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

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Governing Bodies of State Aided Schools: Eastern Transvaal [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 41.

[2] See *Masetlha* above n 1 at para 78 and *EFF* above n 1 at paras 20-1.

[3] *Premier, Province of Mpumalanga* above n 1 at para 41.

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.[4] 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.

[5] In interpreting the Bill of Rights, courts are required to consider international law.[5] Our Constitution also insists that they not only give a reasonable interpretation to legislation but also that the interpretation accords with international law.[6] And unless otherwise inconsistent with our Constitution, customary international law is law in this country.[7] Implicit in this position is that consistency with our Constitution is a critical requirement for the acceptability and applicability of international law to our country. This then ineluctably ought to inform our approach to the assessment of the President's conduct that gave rise to this litigation.

[6] As is the case with any conduct that is believed to be inconsistent with the Constitution or that seems to flout the rule of law, of which legality is an integral part, the President's alleged impermissible exercise of power would ordinarily be open to legal challenge in any court that has jurisdiction. And that is what this matter is about.

[7] The President's negotiation and signing of the 2014 Protocol on the Tribunal in the Southern African Development Community (Protocol)[8] that seeks to denude the Southern African Development Community Tribunal (Tribunal) of its jurisdiction over disputes of individuals against Member States,[9] is challenged on the bases that it

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[4] Article 1 of the International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973.

[5] Section 39(1)(b) of the Constitution.

[6] Section 233 of the Constitution.

[7] Section 232 of the Constitution.

[8] Protocol on the Tribunal in the Southern African Development Community adopted on 21 February 2014. There has not yet been ratification by Parliament of this Protocol pursuant to the President's signature.

[9] Id at article 33.

is unconstitutional, unlawful and irrational.[10] Similarly, his decision to make common cause with his peers to not appoint Members or Judges of the SADC Tribunal or to suspend the operations of the Tribunal is also said to be unconstitutional, unlawful and irrational.[11] And the desired remedy is to so declare and essentially direct the President to withdraw his signature from the Protocol.

Background

[8] The Law Society of South Africa and six other applicants, who were landowners in Zimbabwe,[12] launched an application in the Gauteng Division of the High Court, Pretoria (High Court). And they cited as respondents the President of the Republic of South Africa and both the Ministers of Justice and Correctional Services as well as International Relations and Cooperation. Two amici curiae were admitted to render their assistance to the Court.[13]

[9] The application sought to challenge the decision to suspend the operations of the Tribunal in so far as that decision relates to our President's role in it.[14] The constitutionality of the signature he appended to the 2014 Protocol, that seeks to take away the Tribunal's power to adjudicate individual disputes against a State party, is also under attack.[15] To facilitate a proper appreciation of the implications of the impugned conduct of the President and the validity or otherwise thereof, it is essential that some context be given to that conduct.

[10] The historical reality of this matter is that the Republic of Zimbabwe had embarked upon an ambitious land and agrarian reform programme. To pave the way

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[10] *Law Society of South Africa v President of the Republic of South Africa* [2018] 2 All SA 806 (GP) (High Court judgment) at para 72.

[11] Id.

[12] Mr Luke Munyandu Tembani, Mr Benjamin John Freeth, Mr Christopher Mellish Jarret, Mr Richard Thomas Etheredge, Tengwe Estate (Pvt) Limited and France Farm (Pvt) Limited.

[13] The Southern Africa Litigation Centre (SALC) and the Centre for Applied Legal Studies (CALS); (The words *amici curiae* mean friends of the court).

[14] High Court judgment above n 10 at para 1.

[15] Id.

for it, not only was the Constitution amended to provide for land expropriation without compensation, but to also remove the pre-existing jurisdiction of the domestic courts of Zimbabwe over disputes relating to expropriation without compensation.[16]

[11] The only avenue open to those aggrieved by having been deprived of their land in that constitutionally-sanctioned manner was the Tribunal. And many farmers, including South African citizens who had lost their land in this way, approached the Tribunal. And this really is why and how the matter ended up here. It is fundamentally about challenging the expropriation of land without compensation and the intended removal of the Tribunal's jurisdiction to determine the validity of that kind of land expropriation that was done in terms of the Constitution of Zimbabwe.

[12] Individuals referred their disputes with the Republic of Zimbabwe to the Tribunal. Those disputes implicated human rights and the rule of law. The Tribunal, as was its duty to do, adjudicated issues relating to Zimbabwe's conduct with reference to the relevant provisions of the Treaty of the Southern African Development Community (Treaty).[17] Its conclusion was that Zimbabwe had violated certain provisions of the Treaty and an order unfavourable to Zimbabwe was accordingly made.[18] What was then left for Zimbabwe to do was to comply with the decision of the Tribunal in line with the dictates of the rule of law which are cardinal to the very existence of the Treaty and SADC.

[13] Zimbabwe failed to comply with the order of the Tribunal. It then became necessary for the SADC Summit[19] to reflect on this non-compliance with a binding decision. Instead of facilitating enforcement, the Summit chose to disregard the

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[16] Constitution of Zimbabwe Amendment (No 11) Act 30 of 1990; Chapter 20:10 of the Land Acquisition Act of 1992; Constitution of Zimbabwe (No 12) Act 4 of 1993; and Constitution of Zimbabwe Amendment (No 14) of 1994.

[17] The Treaty was originally established in 1992 and has subsequently been amended several times, with the latest version being the consolidated treaty of 2015.

[18] *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* [2008] SADCT 2 (28 November 2008).

[19] The Summit comprises the Heads of State and the Heads of Government from the SADC Member States. It is the supreme organ of SADC.

States' binding Treaty obligations. This it did by not only treating the relevant Treaty provisions and the Tribunal decision as if they do not exist, but by also violating their undertaking to support and promote the Tribunal whose decisions bind Member States and by extension the Summit.[20] In all of these decisions we, the people of South Africa, participated through our President.

[14] The problem did not begin and end with this disregard for the decision of the Tribunal. Our President, together with leaders of other SADC nations, decided to eviscerate the possibility of the States ever being held to account for perceived human rights violations, non-adherence to the rule of law or undemocratic practices. The source of that threat, of being obliged to account for the exercise of State or public power, was located in the justiciability of individual disputes against the State.

[15] As a result, the Summit resolved to suspend the operations of the Tribunal by neither reappointing Members of the Tribunal whose terms expired in 2010 nor replacing those whose term of office would expire in 2011. This was meant to emasculate the Tribunal since it would not be able to be quorate. We, therefore, were party to denying citizens of South Africa and other SADC countries access to justice at a regional level in relation to their disputes including those relating to human rights, democracy and the rule of law. It is contended that we have removed the rights they used to have for no good reason and on no apparent rational basis. The objective for the suspension of the Tribunal appears to be to render meaningless any favourable decision already secured by individuals against the State where finality or execution has not been achieved, as long as the Tribunal is not quorate. And this is essentially what the second to the seventh applicants' plight is about.

[16] South Africa, together with other States, did not rest our case there. We decided to put our intentions or plans beyond any doubt. As a result, we agreed to and signed the Protocol that provides, among other things, that "[t]he Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to

[20] Articles 6(1) and 16(5) of the Treaty above n 17.

disputes between Member States".[21] The obvious effect or intent of this provision is to strip the Tribunal of its jurisdiction over individual disputes, including a challenge to what they regard as violations of the Treaty in relation to human rights, democracy and the rule of law.

[17] We reiterate that the suspension of the operations of the Tribunal and the signing of the Protocol that seeks to emasculate the Tribunal are challenged on the grounds that they are unlawful, irrational and unconstitutional.

Jurisdiction

[18] The High Court has declared the conduct of the President unconstitutional.[22] That declaration relates to his decision, in collaboration with other SADC leaders, to render the Tribunal dysfunctional by not appointing its Members whenever the need arose, to suspend the operations of the Tribunal and to sign the Protocol whose mission it is to deprive individuals of pre-existing access to the Tribunal.

[19] These declarations of constitutional invalidity are on all fours with the provisions of section 167(5) of the Constitution.[23] For, that section provides that this Court has the final say on the constitutional validity of presidential conduct. It also says that no order of unconstitutionality by any court would be of any force or effect unless it has been confirmed by this Court.

[20] This matter is therefore properly before this Court.

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[21] Article 33 of the Protocol.

[22] High Court judgment above n 10 at paras 67 and 72.

[23] Section 167(5) of the Constitution provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

Prematurity

[21] A point was taken that this Court ought not to entertain this matter because the application was launched prematurely. It is argued that the Protocol should have been left to travel its full journey all the way to Parliament to first be given a binding effect before its validity could be challenged in a court of law. Also that since the President's signature does not give a binding effect to the Protocol, it is inconsequential.

[22] It is true that the Protocol would in terms of its own provisions only be binding after being signed by the President and ratified by Parliaments of a specified number of Member States. And, apart from the fact that it has not been signed by the prescribed minimum number of States, none has ratified it. On the face of it, the Protocol appears to be of no force and effect. But, that is not necessarily dispositive of its consequentiality after being signed and of the prematurity challenge.

[23] *Doctors for Life* provides guidance with greater clarity on prematurity, albeit on a somewhat different subject matter.[24] As a general proposition, legislative and comparable processes must be left to run their normal and full course before courts intervene.[25] This is particularly so where appropriate checks and balances are in place to secure the rights of those who might otherwise have been disadvantaged by actual or perceived irregularities. One such example is our elaborate law-making process which has the added advantage of the President's constitutional power to send legislation back to the National Assembly for reconsideration or refer it to the Constitutional Court for the determination of its constitutionality before assenting to and signing it into law.[26] All this is to be done to protect the rights and interests of the public.

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[24] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*).

[25] Id at para 69.

[26] Id at para 55 and section 79(1), (4) and (5) of the Constitution.

[24] Courts therefore ought to intervene in incomplete processes only when no other avenue is realistically available to adequately address whatever grievances the people might have. It is for this reason that this Court held that after Parliament has passed a Bill and before the President has assented to and signed it, the Court lacks the competence to grant any relief relating to its constitutionality.[27] The reason is not hard to find. Both political arms of the State are not only made up of elected representatives of the people, but the President bears the constitutional obligation to uphold, defend and respect the Constitution. And the National Assembly also has to "ensure government by the people under the Constitution . . . by passing legislation".[28] They are no less empowered and duty-bound to protect and advance the best interests of the citizens than the courts. This would explain why other arms must also be allowed to discharge their obligations in terms of set procedures before courts may interfere, barring exceptional circumstances.

[25] Only under exceptional circumstances, is it permissible for courts to intervene and grant relief in relation to a process that is yet to be finalised. As this Court correctly observed:

> "Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution.
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> The basic position appears to be that . . . courts take the view that the appropriate time to intervene is after the completion of the legislative process. . . . However, there are exceptions to this judicially developed rule or 'settled practice'. Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded

[27] *Doctors for Life* above n 24 at para 56.

[28] Sections 83(b) and 42(3) of the Constitution.

> substantial relief once the process is completed because the underlying conduct would have achieved its object."[29]

Hasty intervention that borders on prematurity is ordinarily inappropriate. That said, the practice or rule is not inflexible. The interests of justice sometimes require court intervention, even if a particular process might still not be complete. A comparison between the principles that govern a law-making process and those applicable to the process prescribed for international agreements is thus necessary.

[26] A superficial reflection on the process to be followed before an international agreement could be binding would suggest that it bears a striking similarity to our law-making process.[30] And if the two processes were in reality so similar as to be virtually identical, then the judicial self-restraint urged on us by the "settled practice" would probably constrain us to wait for Parliament to play its role in terms of section 231(2) of the Constitution fully. Only then could a court challenge to the validity of a treaty be mounted, just as we have to wait until the President has played her part in a legislative process in terms of section 79 of the Constitution.[31]

[27] But here lies the fundamental differences. Parliament, unlike the President, has no constitutionally-allocated power to send an international agreement back to the SADC Summit for reconsideration or for compliance with the applicable regulatory framework. Even if it did, it would be inconsequential since many other Member States are involved and are not subject to the authority of our Parliament. It is also not expressly clothed with the same constitutional power as the President to refer the agreement to the Constitutional Court to certify its validity. It can only approve or reject the agreement. More importantly, unlike a Bill, the signing of a

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[29] *Doctors for Life* above n 24 at paras 68-9.

[30] Id at paras 54-6.

[31] Section 79(1) of the Constitution states that—

> "[t]he President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration."

treaty by our President creates far-reaching possibilities that could have irreversible consequences. Between the signing and possible ratification by our Parliament the door is, where appropriate majorities have been secured, thrown wide open to other Member States immediately to sign, ratify and act on what has been agreed upon. When a binding international agreement has been signed and ratified by the necessary majority, citizens of those countries and our own citizens who might be prejudicially affected by changes in those countries could, depending on the state of governance there, bear the full brunt of the injurious provisions of the agreement even before we ratify it ourselves.

[28] And the need to circumvent that challenge promptly is what *Doctors for Life* had in mind by saying that—

> "intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object."[32]

[29] Here, the constitutional role of the National Executive in relation to international agreements has fully played itself out and there is nothing left to be done in terms of section 231(1).[33] But, that negotiated and signed Protocol poses a serious threat to the constitutional and Treaty rights of our citizens and the Treaty rights of citizens of the rest of the SADC countries who might wish to seek recourse to the Tribunal. In line with *Doctors for Life*, it is necessary to immediately prevent a violation of our Constitution and the rule of law. And this Court had the following to say about the justiciability of legal threats:

> "In finding that the attack on the constitutionality of section 10(2) was not ripe for determination, the High Court erred. The Director of Public Prosecutions had not only informed the appellant that such a certificate would be relied upon in the

[32] *Doctors for Life* above n 24 at para 69.

[33] Section 231(1) of the Constitution provides:

> "The negotiating and signing of all international agreements is the responsibility of the national executive."

> extradition enquiry but had furnished the appellant with a copy of the certificate. The rights claimed by the appellant under the Bill of Rights were thus clearly threatened. Such threat was sufficient to entitle the appellant to approach the High Court for relief under section 38 of the Constitution. It is there expressly provided that anyone acting in their own interest may approach a competent court 'alleging that a right in the Bill of Rights has been . . . threatened'."[34]

The right in the Bill of Rights and the Treaty that is being threatened here is the right of access to justice. And the threat extends to the rule of law.

[30] The President of South Africa is not just any of the many other constitutional office-bearers in the Republic. She is indeed an embodiment of supreme power. When all others fail, it is to that repository of raw power that we all ought to turn. It is in the President that citizens justifiably pin their hopes by reason of the vast and unrivalled capacities she has as a singular centre of extensive constitutional powers. Her signature on official documents, especially international agreements is therefore not ordinary – it is never inconsequential.

[31] Our signing of the Protocol is thus very weighty and significant. It announces to all that South Africa is about to make a radical paradigm shift that is inextricably tied up to who we are as a nation. Specifically, it signifies that access to justice, a commitment to the rule of law and the promotion of human rights would no longer be a paramount feature of our national vision and international relations.

[32] That signature of the singular most powerful constitutional being in our country also says to the SADC Member States that South Africa has shorn itself of its key responsibilities of protecting and promoting some of the values foundational to our democracy including fundamental rights. This constitutes a serious threat to the image and very essence of South Africa's constitutional democracy and citizens' rights. Our President's signature is symbolic of a warm welcome by South Africa of

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[34] *Geuking v President of the Republic of South Africa* [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) at para 33.

the stealthy introduction of impunified disregard for and violation of fundamental rights or key Treaty provisions. It inadvertently but in reality reassures all others that we would turn a blind eye to human rights abuses and non-adherence to the rule of law in their jurisdictions even if it affects our people.

[33] The additional factor to take into account is that our President signed the Protocol on 18 August 2014 − more than four years ago. But, the Executive has not yet handed it over to Parliament to discharge its section 231(2) constitutional responsibilities. How much longer can aggrieved parties be reasonably expected to wait before their court challenge would be regarded as mature? This point also disposes of the prematurity issue.

[34] Another basis for addressing the prematurity question is the Vienna Convention on the Law of Treaties (Vienna Convention).[35] I say this aware that in *Harksen*,[36] this Court simply assumed that it applies without saying why. It adopted this approach but cautioned that the Vienna Convention's applicability and status as "customary international law is by no means settled".[37] It was subsequently recognised by our courts in several instances.[38] That recognition does not appear to have been a product of a reflection on whether the requirements for an international agreement to become customary international law were met. It seems that our courts simply applied it. Its applicability was therefore a consequence of a ready acceptance that there has been compliance. It thus behoves us to examine whether the Vienna Convention has in reality become customary international law and thus applies to South Africa.

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[35] 23 May 1969.

[36] *Harksen v President of the Republic South Africa* [2000] ZACC 29; 2000 (2) SA 825 (CC); 2000 (5) BCLR 478 (CC).

[37] Id at para 26.

[38] Id at para 27. See also *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (*Fick*) at fn 44; *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 9; *President of the Republic of South Africa v Quagliani; President of the Republic of South Africa v Van Rooyen; Goodwin v Director-General, Department of Justice and Constitutional Development* [2009] ZACC 1; 2009 (2) SA 466 (CC); 2009 (8) BCLR 785 (CC) at para 19; and *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[35] There are several ways in which a State may become bound by a treaty like the Vienna Convention. It may sign and ratify, accept or approve it.[39] It may also accede to an already negotiated treaty in whose processing it was not involved.[40] The exchange of instruments that constitute a treaty is another way of becoming bound and so is any other way agreed to. Other mechanisms through which a State may express its consent to be bound are an official statement to that effect in its official platforms of communication.[41] That conduct is regarded as an acceptance of the binding effect of a treaty by any State that embarks on it. And a State would also become bound by a treaty or aspects of a treaty if its domestic court considers either to be part of customary international law.

[36] Although South Africa is not party to the Vienna Convention, it is bound by some of its major provisions[42] like articles 18 and 26.[43] That is so for two reasons. One, an official pronouncement that the Vienna Convention is accepted by South Africa as customary international law has been posted on Parliament's website and that of the Office of the Chief State Law Advisor. And that, as indicated, is universally recognised evidence of a State's acceptance of international custom and its binding effect on it. In line with trite international law practice, the binding effect of the Vienna Convention is limited to its main provisions that are by now known to be part of customary international law. Two, the International Court of Justice (ICJ) has itself made this observation:

> "The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be

[39] See article 11 of the Vienna Convention above n 35.

[40] Id article 15.

[41] Rubin "The international legal effects of unilateral declarations" (1977) 71 *AJIL* 1.

[42] *Gabčíkovo-Nagymaros Dam Case (Hungary v Slovakia)* ICJ Rep 1997 (*Gabčíkovo-Nagymaros*) at para 46; *Kasikili/Sedudu Islands (Botswana v Namibia)* [1999] ICJ Rep 1045 at para 18; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* [1971] ICJ Rep 3 at para 94; *Fisheries Jurisdiction Case (Federal Republic of Germany v Iceland)* [1973] ICJ Rep 49 at para 36. See also [37].

[43] Articles 18 and 26 require States that have signified their consent to be bound by a treaty to perform their obligations under that treaty and to refrain from acts that are contrary to the objects and purpose of that treaty.

> mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law."[44]

[37] Professor Christopher Greenwood, a Judge of the ICJ, has this to say:

> "[M]any treaties are . . . important as authoritative statements of customary law. A treaty which is freely negotiated between a large number of States is often regarded as writing down what were previously unwritten rules of customary law. That is obviously the case where a treaty provision is intended to be codificatory of the existing law. A good example is the Vienna Convention on the Law of Treaties, 1969. . . . [E]very court which has considered the matter has treated its main provisions as codifying customary law and has therefore treated them as applying to all States whether they are parties to the Convention or not."[45]

[38] Not only have we officially accepted that the main provisions of the Vienna Convention are part of customary international law, but Professor Greenwood's authoritative article, which was published by the United Nations, and the ICJ decisions also confirm that the major provisions of the Vienna Convention like articles on interpretation doctrines and the good faith doctrine amount to a codification of customary international law. More importantly, Professor Greenwood alludes to the need for a court to consider the applicability of a treaty and, in a sense, to have sound reasons for treating such a treaty as applicable in its jurisdiction. And section 232 of the Constitution provides that "[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". The question then arises whether those main provisions of the Vienna Convention, article 18 in particular, are consistent with the Constitution.

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[44] *Gabčíkovo-Nagymaros* above n 42 at para 46.

[45] Greenwood "Sources of International Law: An Introduction" (United Nations Audiovisual Library of International Law, 2008) at 2-3. Certified information from the UN website states that there are 45 signatories to the Vienna Convention and a total of 116 parties to it as a result of subsequent accession, succession and ratification.

[39] Section 231(2) of the Constitution provides that an international agreement "binds the Republic only after it has been approved by resolution in both the National Assembly and National Council of Provinces". It is common knowledge that our Parliament never ratified the Vienna Convention. But, it is now settled that its main provisions like articles 18 and 26 are part of the customary international law envisaged in section 232 of the Constitution. Are the terms of article 18 of the Vienna Convention that appear to clothe the Protocol with a binding effect immediately upon signature not inconsistent with the provisions of section 231(2) of our Constitution? The section states that an international agreement will bind the Republic "only after" parliamentary ratification, whereas article 18 provides that the signing of a treaty imposes an obligation on the State "to refrain from acts which would defeat the object and purpose of the treaty". Meaning, if an individual were to take South Africa to the Tribunal now, South Africa would be obligated to object to or resist its jurisdiction in obedience to the dictates of article 18. It also begs the question, if this article constrains the State from acting freely before parliamentary approval of the treaty, is it then consistent with the provisions of section 231(2) of the Constitution as it is in effect required to be by section 232?

[40] But, I am satisfied that there is no conflict. Article 18 alludes to the need for Parliament to still ratify. It does no more than restrain a State that has signed a treaty from acting in a manner inconsistent with the spirit of that treaty or its own commitment as borne out by the signature, pending ratification. It binds the State but only to the extent of conscientising the State about the new direction it has committed itself to. It does not do away with or undermine Parliament's constitutional authority to ratify or not to ratify. The assumption probably is that no Head of State or Head of Government would sign a treaty that does not broadly accord with the Constitution, laws of her country and binding treaty obligations, or advance the State's best interests.

[41] It follows on the force of article 18 that serious consequences flow from a mere signing of an international agreement by a State. For these reasons, the President's

signature cries out for prompt intervention before the majority required by the Protocol signs, ratifies and acts on it. That would help us avoid a situation where, by the time Parliament rejects the Protocol or a court sets its ratification aside on the basis that it was processed impermissibly, "the underlying conduct would have achieved its object".[46] This case falls within that special category that need not wait for the whole section 231 process to be finalised before litigation is justifiable. "[I]mmediate intervention is called for in order to prevent the violation of the Constitution and the rule of law."[47]

[42] The application was therefore not launched prematurely. The nature and implications of the President's conduct require speedy intervention to secure substantial and effective relief.

The implications and invalidity of the President's conduct

[43] Much as one may try to be surgical or categorical in dealing with the different issues concerning the validity of the President's conduct, it is impracticable to achieve that goal sensibly. Simple logic requires that an all-inclusive approach be adopted here. Before I go any further and to avoid any possible misunderstanding in relation to whether the President is personally, or in some legally unrecognisable way, bound by any undomesticated treaty, we need to put this issue to rest at this early stage. Any reference to the President being bound by an undomesticated treaty must be understood as a reference to the binding effect of that instrument on her merely as a representative of the State. In other words, it is the State alone that is itself bound by that undomesticated legal instrument. The reservation expressed by my Colleagues Cameron J and Froneman J in their concurring judgment must thus be understood in this context and so should any other reference to this issue in the previous and subsequent paragraphs of the majority judgment. It has also been made abundantly clear in this majority judgment that relevant constitutional provisions, including

[46] *Doctors for Life* above n 24 at para 69.

[47] Id.

sections 7 and 8, are relied on for the determination of the lawfulness, rationality and constitutionality of the President's conduct.

[44] That said, every issue that arose for determination is, or is traceable to, an offshoot of a masterplan that was devised by the Summit at the instance of the Republic of Zimbabwe. Clearly, Zimbabwe did not want to comply with the unfavourable decisions made against it by the Tribunal. It then crafted a strategy that would be fatal to the possibility of the Tribunal ever embarrassing it again.

[45] In all of the above efforts to paralyse the Tribunal, Zimbabwe had a willing ally in South Africa, as represented by our President. The non-appointment of new Judges and non-renewal of expired terms was a scheme designed to ensure that the Tribunal would not function because it would not be quorate. Added to this mix was the decision to impose a moratorium on the referral of individual disputes to the Tribunal and the signing of the Protocol that seeks to essentially make this state of affairs permanent.

Procedural irregularity and unlawfulness

[46] The Constitution vests extensive powers in the President. And rightly so. But—

> "the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers. These are significant constraints upon the exercise of the President's power."[48]

[47] In *Affordable Medicines*, we said:

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

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."[49]

[48] What the principle of legality entails in the present context is that our President may only exercise power that was lawfully conferred on her and in the manner prescribed. That power must be exercised in good faith and should not be misconstrued. Legality therefore exists to ensure that the repository of public power stays within the vital limits of the power conferred and being exercised. Both Houses of our Parliament resolved, in terms of the predecessor of section 231(2) of our Constitution,[50] to ratify the Treaty.[51] For this reason, no constitutional office-bearer, including our President may act, on behalf of the State, contrary to its provisions. They are all, as agents of the State, under an international law obligation to act in line with its commitments made in terms of that Treaty. And there was and still is no legal basis for the President to act contrary to the unvaried provisions of a binding Treaty.

[49] Whatever the President does must accord with the Constitution and the law. The Protocol that operationalised the Tribunal is an integral part of the Treaty. The jurisdiction of the Tribunal may therefore only be lawfully tampered with in terms of the provisions of the Treaty that regulate its amendment. And it cannot properly be amended in terms of a protocol. It may only be amended by three-quarters of the

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[49] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 49.

[50] Section 231(2) of the Constitution provides:

> "An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)."

[51] South Africa joined SADC by acceding to the Treaty on 29 August 1994. Our Senate and National Assembly approved the Treaty on 13 and 14 September 1995 respectively. This was done in terms of section 231(2) and (3) of the interim Constitution.

SADC Member States.[52] The Summit, however, sought to amend the Treaty through a protocol, thus evading compliance with the Treaty's more rigorous threshold of three-quarters of all its Member States. The protocol route would have been an easy way out in that it only requires the support of ten Member States to pass.[53] But, it is not a legally acceptable procedure for stripping the Tribunal of the most important aspect of its jurisdiction.

[50] We signed and ratified the Treaty not merely as a consequence or "misfortune" of the imperatives of geo-political location. It was a thoughtful and appropriate decision to take for the good of our people, our democracy, the image of the SADC region and, by extension, of Africa. This is so because the provisions of the Treaty, its institutions and set agenda accord with our progressive constitutional vision. Our President, however, signed the Protocol that was not even supported by three-quarters of the Member States. And as the High Court correctly held—

> "[a]ny protocol to the SADC Treaty is a subordinate legal instrument and it is not permissible to emasculate a SADC organ established by the SADC Treaty itself, in this manner. The SADC Treaty itself was not amended and the desired result was illegally contrived through an attempt to repeal and replace the 2000 Protocol on the Tribunal by the 2014 Protocol."[54]

[51] In terms of the Treaty, the Executive and Parliament commit us to the entrenchment of a human rights culture, a democratic order and adherence to the rule of law.[55] To give teeth to this commitment and in apparent recognition of the doctrine of separation of powers at a regional level, the Tribunal was established. Its stated mandate was "to ensure adherence to and the proper interpretation of the provisions of this Treaty".[56] To guarantee its independence, dignity and effectiveness, its decisions

[52] Article 35(1) of the Treaty.

[53] Article 53 of the Protocol.

[54] High Court judgment above n 10 at para 64.

[55] Preamble and Article 4 of the Treaty.

[56] Article 16(1) of the Treaty.

are "final and binding".[57] 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.[58] Their decision to amend the Treaty through the Protocol evidences a failure to adhere to the provisions or proper meaning of the Treaty.

[52] More importantly, the Tribunal is an institution of SADC and the Treaty requires "a resolution supported by three-quarters of all members to dissolve . . . any of its institutions".[59] What the Summit did was to effectively dissolve the Tribunal by taking away its critical functions – the resolution of individual disputes relating to alleged non-adherence to the dictates of human rights and the rule of law as well as undemocratic practices. These, after all, constitute almost the entire list of disputes that the Tribunal have entertained and decided since its establishment. And as a direct consequence of a series of actions taken by our President and his counterparts, the Tribunal has been dysfunctional for a very long time, rendering it effectively as good as dissolved.

[53] 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.

[54] Additionally, this Court has previously observed that our country is under an obligation to protect the Tribunal and resist "any attempt to undermine or subvert" the

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[57] Article 16(5) of the Treaty.

[58] Articles 4(c) and 6(1) and (6) of the Treaty.

[59] Article 35(1) of the Treaty.

role and authority of the Tribunal and the obligations that flow from that Treaty.[60] This is the consequence of our duty to fulfil our international law obligations. And it finds support from article 26 of the Vienna Convention.

[55] 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.[61] And this, he failed to do thus rendering this conduct unlawful on this ground as well. He could only have been acting in good faith and with due regard to the object and purpose of the Treaty if he did not opt for an amendment procedure that makes it easier to amend but is not even provided for by the Treaty. Sadly, he misconstrued his powers.

[56] Our President thus acted unlawfully by following an impermissible or irregular procedure. Worse still, not only did he not have the power to not appoint or renew the terms of Members of the Tribunal but also lacked the authority to suspend its operations. This illegality of his conduct also stems from purporting to exercise powers he does not have. And it cannot be overemphasised that his conduct was also unlawful in that he failed to act in good faith and in pursuit of the object and purpose of the Treaty we have bound ourselves to.[62]

Juxtaposing the Tribunal with apex national courts

[57] A matter of great importance that need only be flagged at this stage is whether the Tribunal has jurisdiction even where national apex courts have pronounced themselves on the same issue between the same parties, which would then elevate it to a super-regional court or whether its jurisdiction is only triggered when a domestic

[60] See *Fick* above n 38 at para 59.

[61] See article 26 of the Vienna Convention above n 35.

[62] See article 26 of the Vienna Convention above n 35.

court lacks jurisdiction in a particular matter, involving alleged violation of treaty provisions, as is the case with Zimbabwe.

[58] To facilitate a proper appreciation of the point, reference to article 15 of the 2000 Protocol is essential.[63] It provides:

> "1. The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States.
> 2. No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.
> 3. Where a dispute is referred to the Tribunal by any party the consent of other parties to the dispute shall not be required."

[59] This article seems to imply that disputes relating to issues provided for by both the Treaty and national constitutions are "appealable" or justiciable before the Tribunal even after the highest court of any SADC country has finally disposed of the matter. The precondition for a natural or legal person to have access to the Tribunal only after he or she has "exhausted all available remedies . . . under domestic jurisdiction" seems to allude to that possibility. And that might mean that the Tribunal could even set aside the decisions of apex courts.

[60] It may well be that the Executive and Legislature need to reflect on whether there is a need to do anything at all about these apparently conflicting positions. And it really cannot do any harm but could do a lot of good to our constitutional democracy and good governance to alert them to the possible conflict in case they are not alive to it. Since this is not an issue that has been raised by any of the parties, it is best left open for another day.

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[63] Protocol on Tribunal in the Southern African Development Community, 2000.

Irrationality

[61] The evolution of our constitutional jurisprudence culminated in a principle that recognises that rationality applies not only to the decision, but also to the process in terms of which that decision was arrived at. And this applies to our President acting either as Head of the Executive or Head of State.[64] In sum, the exercise of the power to amend the Treaty must in relation to both the process leading up to the amendment and the amendment itself, be rationally related to the purpose for which that power to amend was exercised.[65] The principle was laid down in these terms:

> "It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law. More recently, and in the context of section 84(2)(j), we held that, although there is no right to be pardoned, an applicant seeking pardon has a right to have his application 'considered and decided upon rationally, in good faith, [and] in accordance with the principle of legality.' It follows therefore that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it.
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> All this flows from the supremacy of the Constitution. The President derives the power to grant pardon from the Constitution and that instrument proclaims its own supremacy and defines the limits of the powers it grants. To pass constitutional muster therefore, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution."[66]

[62] In *Simelane*, we reiterated its application to process in these terms:

> "[W]e must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether

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[64] *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) (*Simelane*) at paras 34-5.

[65] Id at para 36.

[66] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at paras 49-50; *Affordable Medicines* above n 49 at paras 75 and 77.

> the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality."[67]

Here, the "step to the end" sought to be achieved is the procedure followed to effect the desired amendment. In other words, the Protocol is that vehicle that was chosen to drastically reduce the jurisdiction of the Tribunal through an amendment.

[63] And in *Masetlha*, this Court said:

> "[T]he authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution. Procedural fairness is not a requirement."[68]

[64] The proposition in *Masetlha* might be seen as being at variance with the principle of procedural irrationality laid down in both *Albutt*[69] and *Simelane*.[70] But it is not so. Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered.[71] Not so with procedural irrationality. The latter is about testing whether, or ensuring that there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power.

[65] The question to be answered in this case therefore is not whether anybody was heard or not heard or dealt with in terms of a fair or arbitrary and oppressive process. It is whether the procedure for the exercise of the power to suspend the Tribunal and amend the jurisdiction of the Tribunal is rationally related to the realisation of the

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[67] *Simelane* above n 64 at para 37.

[68] *Masetlha* above n 1 at para 78.

[69] *Albutt* above n 66 at paras 49-52.

[70] *Simelane* above n 64 at paras 36-7.

[71] This is the issue that *Masetlha* above n 1 addresses at, for instance, para 74. This is why *Administrator of the Transvaal v Zenzile* [1990] ZASCA 108; 1991 (1) SA 21 (A) and *Administrator of Transvaal v Traub* [1989] ZASCA 90; 1989 (4) SA 731 (A) were central to the determination of whether procedural fairness finds application in challenges relating to the exercise of Presidential and Executive powers. Yet, rationality was readily acknowledged as a valid ground for challenging the constitutional validity of the President's exercise of her powers.

purpose for which the power to amend the Treaty was conferred and exercised by our President together with other SADC Heads of State and Heads of Government, on behalf of Member States.

[66] In *Simelane*, for instance, the broad question was whether the process followed in the exercise of the presidential power to appoint the National Director of Public Prosecutions was rationally related to the legitimate governmental purpose of ensuring that the would-be incumbent is tested for the qualities required of the person the President was given the power to appoint. In this case, the question is whether the suspension or amendment is effected in terms of a process that ensures that our President and his counterparts do not lightly veer off the fundamental guarantees and progressive provisions of the Treaty and the spirit of our Constitution that must of necessity be taken into account in exercising the power to amend the Treaty as they purported to do. Does the process accord with the need to amend the Treaty in a drastic way only in circumstances where there is a proper appreciation of and respect for the sanctity of key treaty provisions?

[67] As the Treaty stands, one of its fundamental objectives is to ensure that there is a Tribunal in place to interpret its provisions which would in turn facilitate adherence to its terms. And SADC itself is in terms of that Treaty obligated to promote access to justice, democracy, human rights and the rule of law. But, the Summit, on behalf of Member States, has the power to amend the Treaty and to even disestablish its institutions.[72] To take those far-reaching decisions requires that a procedure, consistent with the magnitude of those decisions be followed. That procedure must also accord with the purpose for which the provisions to be amended exist and the reasons for which the power to amend was conferred. And that is the amendment procedure that requires three-quarters of all Member States.[73]

[72] Article 35 of the Treaty.

[73] Article 36 of the Treaty.

[68] The 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. That power is therefore never to be exercised lightly. It is to be exercised in a manner consistent with the seriousness of its consequences to ensure that the invaluable gains and interests of the people of SADC are preserved. The exercise of the power to amend the Treaty must reflect that steps followed in the process leading to the amendment bear a rational relationship with the legitimate purpose for which the power to amend was conferred or exercised.

[69] It is necessary to reiterate that the legitimate purpose for prescribing an amendment process that requires the support of three-quarters of Member States is designed to render it very difficult to fatally amend provisions that relate to the very essence of the Treaty, like the protection of human rights, access to the Tribunal and the rule of law. We emphasise that the purpose for regulating the power to amend so tightly is to secure the best interests of SADC citizens. An amendment like the downgrading of the status of the Tribunal is therefore required to be overwhelmingly supported. The procedure for the amendment through the Protocol that was followed is not only unavailable to the Member States, but also frustrates the purpose for giving them the power to amend the Treaty. It requires a lesser majority support to pass than the amendment procedure prescribed by the Treaty.

[70] And it is the means that so taints the decision to amend that it has no rational relationship with the purpose sought to be achieved through the exercise of the power to amend. This disregard for the amendment procedure set out in the Treaty and the concomitant failure to appreciate the purpose for the exercise of the power to amend within the context of binding Treaty provisions is irrational and invalidates the President's conduct in relation to the amendment.

[71] It is not only unlawful to suspend the operations of the Tribunal in terms of non-existent power but also irrational. And this is one more ground for the

invalidation and setting aside of the President's participation in the decision to suspend the operations of the Tribunal and amend its jurisdiction.

Unconstitutionality of the signature

[72] The President signed the Protocol that seeks to take away a pre-existing individual right of access to the Tribunal. And the question is whether section 231(1) of the Constitution, read with the Bill of Rights and duly guided by a proper appreciation of the broader scheme of our Constitution and binding international law, allows him to do that. This is so because not only is the Constitution our supreme law, but any conduct that is inconsistent with it is invalid and falls to be set aside.[74] The power to negotiate and sign an international agreement derives from section 231(1). The supremacy and scheme of the Constitution in which it is located must of necessity guide the exercise of that power.

[73] In *Fick*, we said:

> "South Africa has essentially bound itself to do whatever is legally permissible to deal with any attempt by any Member State to undermine and subvert the authority of the Tribunal and its decisions as well as the obligations under the Amended Treaty. Added to this, are our own constitutional obligations to honour our international agreements and give practical expression to them, particularly when the rights provided for in those agreements, such as the Amended Treaty, similar to those provided for in our Bill of Rights, are sought to be vindicated. We are also enjoined by our Constitution to develop the common law in line with the spirit, purport and objects of the Bill of Rights."[75]

[74] And in *Glenister*, we spoke poignantly about the legal and constitutional implications of Parliament's resolution to approve an international agreement:

> "[O]ur Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on

[74] See *Albutt* above n 66 at paras 49-50.

[75] *Fick* above n 38 at para 59.

> the Republic in international law, and makes them the measures of the State's conduct in fulfilling its obligations in relation to the Bill of Rights."[76]

[75] A proper determination of the constitutionality of the President's conduct requires that several principles be taken into account. First, the Bill of Rights is not only the cornerstone of our democracy, but also binds all arms of the State and applies to all law. Second, the State has a constitutional obligation to protect, respect, promote and fulfil the Bill of Rights.[77] Third, we have the duty to honour our international law obligations and act consistently with that commitment and that extends to not undermining or subverting the authority of the Tribunal.[78] Fourth, international law that is reconcilable with our Constitution is an essential tool in ascertaining whether our constitutional obligations have been discharged and fundamental rights upheld.[79] Fifth, we recognise access to the Tribunal as an important instrument for the reinforcement of the constitutional right of access to justice in South Africa.[80] And sixth, the exercise of power must promote and seek to fulfil, rather than undermine, the rights in the Bill of Rights.[81]

[76] The President is, generally speaking, empowered to negotiate and sign international agreements on our behalf.[82] For this reason, when he participated in the Summit discussions on the future of the jurisdiction of the Tribunal, he was negotiating a possible international agreement and signed the Protocol, exercising these executive powers. And that negotiation process is, broadly speaking, innocuous. It is the product of such a process that ought to matter the most. For it is always open to the Executive to participate in negotiations provided, in doing so, they do not align us with decisions that are inimical to our constitutional dream.

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[76] *Glenister* above n 38 at para 178.

[77] Sections 7 and 8 of the Constitution.

[78] *Fick* above n 38 at para 59.

[79] *Glenister* above n 38 at para 178.

[80] *Fick* above n 38 at para 69. See also section 34 of the Constitution.

[81] *SARFU* above n 48 at para 148.

[82] See Section 231(1) of the Constitution.

[77] The President may therefore not approve anything that undermines our Bill of Rights and international law obligations. We are about access to justice and access to all appropriate justice-dispensing platforms. He thus lacked the authority to sign any international agreement that seeks to frustrate the pre-existing right of South Africans to access justice, that was secured for them by our supreme law-making body. As long as fundamental rights, like access to justice, that are protected by an international agreement also remain an integral part of our Constitution, the President may not, without a prior and proper amendment to remove those rights, initiate a process that constitutes a threat to them. And it was in this spirit that we had the following to say specifically about the Treaty:

> "The Amended Treaty, incorporating the Tribunal Protocol, places an international law obligation on South Africa to ensure that its citizens have access to the Tribunal and that its decisions are enforced. Section 34 of the Constitution must therefore be interpreted, and the common law developed, so as to grant the right of access to our courts to facilitate the enforcement of the decisions of the Tribunal in this country."[83]

[78] The obligation to respect, protect, promote and fulfil the rights in the Bill of Rights,[84] which includes the right of access to justice, does not only find application at a domestic level. It is inseparable from whatsoever is done in the name of the State, regardless of where and with whom. The President's power in terms of section 231(1) is permissibly exercisable only insofar as it is aimed at protecting, promoting, respecting and fulfilling the rights in the Bill of Rights. The proper exercise of that power is therefore inextricably connected to the fulfilment of these obligations. There is just no room for deviation, particularly where citizens' existing rights are likely to be undermined or extinguished at any level where they used to be enjoyed.

[79] The President signed a Protocol that unabashedly sought to put us and the people of SADC in a position that is worse than before. He, however, does not have

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[83] *Fick* above n 38 at para 69.

[84] See section 7 of the Constitution.

the power to act as if section 7(1) and (2) and section 8(1) of the Constitution do not exist. He may also not act as if article 26 of the Vienna Convention, duly undergirded by customary international law, is not binding. Not even Parliament has the authority to ratify that Protocol in terms of section 231(2) as long as the Bill of Rights and international law, in the form of the Treaty that binds it, still contains rights that would be effectively undermined thereby or whose violation would thus be facilitated at a regional level.

[80] In signing the Protocol, the President was effectively issuing a very serious threat to all citizens that their right of access to justice through the Tribunal was going to be taken away. Sadly, that individual right of access was immediately frozen when the provisions of article 18 of the Vienna Convention were activated by the President's signature. Whether he realised the profundity of his actions or not, he was effectively renouncing some of the foundational values of our democracy. He effectively disregarded "the rights of all people in our country".[85] He was in reality announcing to SADC and the world at large that a critical aspect of what defines our constitutional democracy will no longer be respected, protected, promoted or fulfilled.

[81] Through his actions, we 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.

[82] Extensive as the powers of the President rightly are, when negotiating and signing international agreements purportedly in terms of section 231(1), she must act in a manner that accords with the spirit, purport and objects of the Bill of Rights. Just as our constitutional jurisprudence does not condone the extradition of alleged or convicted criminals to jurisdictions that may impose the death penalty for offences

[85] Section 7(1) of the Constitution.

they are suspected or convicted of,[86] it is constitutionally impermissible, as long as our Constitution and the Treaty remain unchanged, for the President to align herself with and sign a regressive international agreement that seeks to take away the citizens' right of access to justice at SADC level.

[83] The individual right of access to the Tribunal was still protected by the Treaty when the President signed the impugned Protocol. Our Constitution, duly strengthened by our jurisprudence in relation to the binding effect of the Treaty and its access to justice provisions, still provides for the individual right of access to justice. And the procedure for amending the Treaty that requires a three-quarters majority still applied. Our President's signature on the Protocol that required a lesser majority support to take away the right of access to justice flouts the principle of legality which is an incident of the rule of law – one of the foundational values of our democracy. He purported to exercise the power he does not have.

[84] Additionally, he sought to remove the right of access to justice or access to the Tribunal when the Treaty and our Constitution still provided for it and required of us and other Member States to protect it. Finally, he 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 section 231(1) powers in an impermissible manner.

[85] The advancement of human rights and freedoms, the rule of law and a democratic government that is accountable are some of the foundational values of our democratic order. Our duty as a nation or the State is to protect and promote these values and the citizens' right of access to the Tribunal through state machinery. Our

[86] *Minister of Home Affairs v Tsebe, Minister of Justice and Constitutional Development v Tsebe* [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC); and *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).

President lacks the authority to negotiate and sign away our fundamental and treaty right of access to justice and to potentially prejudice citizens of other SADC countries in that manner. To the extent that he purported to do so, his conduct is unconstitutional.

Public participation

[86] A point was taken that the signature of the President is constitutionally invalid by reason of its disregard for the requirements of our participatory democracy. It was argued that the President was obliged to consult the public before signing the Protocol. And because he failed to do so, it is also contended that his signature is invalid.

[87] Public participation in the law-making process is a requirement, specifically provided for in our Constitution,[87] that must be met by our law-making institutions. But, participatory democracy is not provided for in similar terms in relation to the exercise of presidential or executive power. The negotiation and signing of international agreements like the impugned Protocol is an exercise of executive power. And there is no legal provision or principle that even remotely imposes an obligation on the Executive to invite the public to participate in its decision-making

[87] Section 59 of the Constitution provides:

> "(1) The National Assembly must—
>
> (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
>
> (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public."

Section 72 of the Constitution provides:

> "(1) The National Council of Provinces must—
>
> (a) facilitate public involvement in the legislative and other processes of the Council and its committees; and
>
> (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public."

Section 118 of the Constitution provides:

> "(1) A provincial legislature must—
>
> (a) facilitate public involvement in the legislative and other processes of the legislature and its committees; and
>
> (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public."

processes as proposed. Desirable though it might be, we would be straining even the scheme of the Constitution if we were to elevate public consultation to the level of a requirement. It is always open to the Executive, whenever it deems it fitting to do so, to involve the public. But a failure to do so, however enriching to the decision-making process it might otherwise have been, can never rise to the level of a failure to fulfil a constitutional obligation to consult the public.

[88] There is thus no merit in the contention that the public should have been consulted in compliance with the dictates of participatory democracy before the President negotiated or signed the impugned Protocol.

The need for sound diplomatic relations

[89] Our President is never at large to do whatever leaders of other nations consider to be in the best interests of our and their nations. She is always to be guided by the Constitution and the law. For she is the nation's constitutional messenger and may only do what would benefit us and project our country in a positive light. And we promise in the Preamble to our Constitution to "[b]uild a united and democratic South Africa able to take its rightful place as a sovereign State in the family of nations". The words "rightful place as a sovereign state" are quite telling.

[90] Disagreement with other SADC family members is healthy, and typical of the richness that diversity at a regional level ought to bring into the fold. It is not a sign of hostility, but a function of the seriousness with which any democratic and truly sovereign State ought to approach and discharge its obligations or play its role when the rule of law or the essence of justice is sought to be undermined in our region. Comity and sound diplomatic relations ought never to be a product of illegal or unconstitutional compromises that could, rightly or wrongly, be viewed as capitulating to the desires of others to exercise unchecked power to the potential prejudice of the rights of citizens.

[91] The correct approach to sound diplomatic relations and international cooperation here is, from a correct South African perspective, fundamentally about the protection and promotion of the essence of our Bill of Rights and of the Treaty, namely, access to justice, human rights, democracy, the rule of law and the independence and effectiveness of institutions that strengthen good governance. We ought to relate cordially with other nations and not to dictate to them. Similarly, we are never to feel obliged to relinquish our sovereignty and rightful place in the family of nations at the altar of diplomacy, comity and the need for consensus. We thus have to relate with other sister countries with an unshakeable purpose of contributing to the realisation of a more just, equal, peaceful, human rights-oriented, truly democratic order and shared prosperity. This is especially so in a region that has a long and painful history of struggling for the attainment of these good governance, economic development, growth and stability-enhancing goals of universal application.

[92] It follows 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.

Remedy

[93] The President's decision to render the Tribunal dysfunctional is unconstitutional, unlawful and irrational. And so is his signature. The appropriate remedy is simply to declare his participation in arriving at that decision, his own decision and signing of the Protocol constitutionally invalid, unlawful and irrational.

[94] We cannot withdraw the President's signature. But, we may direct him to withdraw his signature to the Protocol. One President is a successor in title of another and the obligations are similarly transferable from one to the other. For the execution of the duties attendant to the presidential office and antecedent authority is never really incumbent-specific. The power and obligations devolve from one personality to another – it is, after all, the Presidency. Whoever the President happens to be will be directed to withdraw the President's signature to the Protocol.

Costs

[95] Barring exceptional circumstances, the amici curiae are not entitled to costs. They routinely apply to be our friends and real friends hardly ever plead for an opportunity to assist, only to have others burdened with foreseeable financial obligations that flow from their unsolicited intervention. It was no doubt with this understanding that the two amici curiae were upfront in courteously renouncing the High Court order awarding them costs and are not asking for costs in this Court.

[96] Costs will thus follow the result, but only for the parties. And no costs, in this Court and in the High Court, will be awarded to the amici curiae.

Order

[97] In the result, the following order is made:

1. The order of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria on 1 March 2018 in case number 20382/2015 is confirmed in these terms:

    1.1 The President's participation in the decision-making process and his own decision to suspend the operations of the Southern African Development Community Tribunal is unconstitutional, unlawful and irrational.

    1.2 The President's signature of the 2014 Protocol on the Tribunal in the Southern African Development Community is unconstitutional, unlawful and irrational.

    1.3 The President is directed to withdraw his signature from the 2014 Protocol.

    1.4 The President must pay costs to the applicants, including the costs of two counsel.

    1.5 There will be no costs payable to the Southern Africa Litigation Centre and the Centre for Applied Legal Studies.

2. In this Court, the President must pay costs to the first to seventh applicants, including the costs of two counsel.

CAMERON AND FRONEMAN JJ (Mhlantla J, Petse AJ concurring):

[98] We have had the pleasure of reading the judgment of brother Mogoeng CJ (majority judgment). We agree largely with the approach and reasoning as well as with the order in that judgment. Our concurrence in the reasoning has one reservation. That is the basis for the Court's finding that the President behaved irrationally and unlawfully in agreeing to the destruction of the Tribunal by amending the Treaty and signing the 2014 Protocol. That irrationality and that unlawfulness spring not from any affront the President directly inflicted on international law, but from the infringement of our own Constitution. This is primarily a review of the President's exercise of public power and the bounds of its lawfulness. Our own Constitution, in particular sections 7(2) and 8(1), provides the foundation from which the review must proceed. It is the Constitution that determines the lawful boundaries the President's conduct violated.

[99] The majority judgment proceeds on the premise that amending the Treaty was unlawful because the President acted in breach of the Treaty itself. The majority judgment thus seems to locate the unlawfulness of the President's conduct directly in international law norms.[88] It is true that, since the President holds office under the Constitution, and his powers proceed from the Constitution alone, conduct that is wrongful under the Constitution may, under international law, be attributed to the country of whose highest office he is the incumbent.

[88] [56] referring to article 26 of the Vienna Convention as well as the Treaty's provisions on amendment.

[100] But the President cannot, in this or any other capacity, directly fall foul of the international law of treaties. Only a sovereign State or an international organisation can. Only these creatures of international law have the capacity to become Party to a treaty, and, as a corollary, to breach the provisions of a treaty.[89] As a subject of international law itself, South Africa is bound by the Vienna Convention and the Treaty. But, directly, the President is not. The President is bound by the Constitution. It is the Constitution that enswathes the President with the obligation to ensure that his conduct does not result in a breach of South Africa's international obligations.

[101] By agreeing to amend the Treaty and by thus agreeing to strip away pre-existing rights of access to justice that the Treaty had conferred on South Africans, the President failed to fulfil his obligation, under our Constitution: to "respect, protect, promote and fulfil" the rights in the Bill of Rights.[90] That failure was a breach of the Constitution. The unlawfulness of the President's conduct derives from its breach of sections 7(2) and 8 of the Constitution.[91] It does not derive directly from any violation of international treaty provisions.

[102] The same reservation applies to the approach of the majority judgment to irrationality.[92] This likewise appears to apply the principle of irrationality to the President's conduct in the setting of international law, rather than in the sole context of domestic law. This does not seem feasible. It was the conduct of the President, irrational and irregular as it was under our Constitution, that resulted in South Africa, as a sovereign State, violating its international obligations. South Africa's conduct,

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[89] International treaty law primarily concerns itself with the rights and duties of States vis-à-vis other States. Article 2 of the Vienna Convention provides that treaties are "international agreement[s] concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". This is with the exception of international criminal law (where individuals can be held accountable for international crimes set out in international treaties) and some international organisations. See also Dugard, *International Law: A South African Perspective* 4 ed (Juta & Co, Cape Town 2012).

[90] Section 7(2) of the Constitution.

[91] *Glenister* above n 38 at paras 157, 182 and 190-2.

[92] [61] to [71].

through its highest office-bearer, the President, breached South Africa's obligations under the Treaty. That was in the sphere of international law. But this same conduct, irrational and irregular within our own constitutional framework, did not constitute an international law violation on the part of the President himself. Only in the conduct of the South African State, represented by its highest incumbent, could international law be violated.

[103] It is thus in the Constitution alone that we should ground the finding that the President behaved irrationally and unlawfully, and not directly under international law or treaty provisions.

[104] Once we locate the ground for reviewing the President's conduct in the Constitution, and the Constitution alone – in the failure to "respect, protect, promote and fulfil" South Africa's international law commitments to access to justice for its people,[93] we are spared unnecessary complexity. We do not need to examine the tangled question of when and how an international treaty becomes domesticated within South Africa.

[105] This approach also spares us the need to engage in the debate on President's individual capacity in the realm of the law of treaties. But what remains clear is that the President's conduct, resulting as it did in a breach by South Africa of its obligations under an international treaty as a State, was impermissible under the Constitution, as irrational and unlawful.

[93] Section 7(2) and section 8(1) of the Constitution.

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