IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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

In the matter between:

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

REGISTRAR OF THE CONSTITUTIONAL COURT
OF SOUTH AFRICA
2018 -07- 20
GRIFFIER VAN DIE GRONDWETLIKE HOF
SUID-AFRIKA

and

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

FIRST APPLICANT'S PRACTICE NOTE

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1. HEARING DATE

Confirmation hearing in terms of section 172(2)(a) of the Constitution scheduled for hearing on 30 August 2018.

2. COUNSEL INVOLVED IN THE MATTER

For the First Applicant:	Dumisa Ntsebeza SC (082 467 2490) Tembeka Ngcukaitobi (083 401 6802) Tshidiso Ramogale (064 082 7723)
For the Second to Seventh Applicants:	Jeremey Gauntlett SC (082 413 9093) Frank Pelser (079 582 7728)
For the First to Third Respondents:	Gilbert Marcus SC (083 452 5105) Andreas Coutsoudis (082 846 6762) Hephzibah Rajah (072 059 9261)

3. NATURE OF THE APPLICATION

3.1. The nature of this application is a confirmation hearing of an order of constitutional invalidity granted by the High Court of South Africa, Provincial Division, Pretoria against the decisions of former President Zuma to (a) participate in the suspension of the Southern African Development Community Tribunal and (b) his signature to the 2014 Protocol that seeks to limit the jurisdiction of the Tribunal.

3.2. The order of the High Court is fully supported by the First Applicant (the Law Society) and in part by the Second to the Seventh Applicants (the 'Tembani' applicants). The Tembani applicants also seek an order directing the President to withdraw the signature of former President Zuma to the 2014 Protocol.

3.3. The First to Third Respondents (the 'State') appeal the order of the High Court that found that the President's signature of the 2014 Protocol was irrational, unlawful and unconstitutional. They also appeal the costs order granted by that court in favour of the *amici*.

4. ISSUES TO BE DETERMINED

4.1. Whether the former President's decision to participate in the suspension of the SADC Tribunal is irrational, unlawful and unconstitutional; and

4.2. Whether the former President's signature of the 2014 Protocol was irrational, unlawful and unconstitutional.

5. RELIEF SOUGHT

5.1. The Law Society seek an order in terms of its the Notice of Motion confirming the declaration of constitutional invalidity granted by the High Court.

5.2. The Law Society also seek an order for costs against the State parties.

6. DURATION

2 – 3 Hours

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and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — **First Respondent**

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT — **Second Respondent**

MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION — **Third Respondent**

FIRST APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

TREATY OBLIGATIONS IN A NUTSHELL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MATERIAL FACTS

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

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

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

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

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

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

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[4] Record, vol. 4, pp. 422 – 472.

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

[6] Id at p. 526.

[7] Id at pp. 530-1.

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

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

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

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

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

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

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

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[10] Id.

[11] Id at para 9.

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

[13] Id.

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

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

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

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

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

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

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

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

[16] Id at para 3.2.2.6 (ii).

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

[18] Record, vol. 9, pp. 887 – 909..

[19] Id at p. 903.

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

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

[20] Id at p. 909.

THE FULL COURT'S FINDING

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

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

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

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

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

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

[22] Id p.97 at para 64.

[23] Id p. 100 at para 68.

[24] Id pp. 99 – 100 at paras 67-8.

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

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

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

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

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

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

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

[26] Id pp. 100 – 101 para 68.

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

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

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

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

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[27] Id pp. 101 – 102 para 69.

[28] Id pp. 103 – 104 at para 71.

[29] Id p. 97 at para 64.

[30] Id pp. 102 – 103 at para 70.

[31] Id pp. 103 – 104 at para 71.

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

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

[32] Id pp. 102 – 103 at para 70.

[33] Id pp. 104 – 105 at para 72.

RATIONALITY REVIEW OF EXECUTIVE ACTION

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

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

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

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

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

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

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

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

SOUTH AFRICA'S INTERNATIONAL LAW OBLIGATIONS

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

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

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

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

Furthermore, that—

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

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

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

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[36] Id at para 194.

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

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

[39] Id.

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

And that—

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

Furthermore, that—

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

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

[47] Id at para 52.

[48] Id at para 53.

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

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

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

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

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

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

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

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

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

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

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

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

[49] Id at para 53.

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

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

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

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

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

[50] Id at para 54.

[51] Id.

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

THE POWER TO SUSPEND

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

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

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

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

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

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

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

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

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

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

SIGNATURE OF THE 2014 PROTOCOL

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

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

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

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

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

Defence factually untenable

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

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

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

[53] Id.

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

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

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

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

Lack of authority

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

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[55] Id.

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

[57] Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Irrationality

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

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

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

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

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

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

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

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

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

And that—

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

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

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

[67] Id at para 33.

[68] *Mahomed* at paras 48 – 55.

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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