IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.

(3) REVISED. ✓

1/3/18
DATE

SIGNATURE

Case Number: 20382/2015

In the matter between:

LAW SOCIETY OF SOUTH AFRICA	1ST APPLICANT
LUKE MUNYANDU TEMBANI	2ND APPLICANT
BENJAMIN JOHN FREETH	3RD APPLICANT
RICHARD THOMAS ETHEREDGE	4TH APPLICANT
CHRISTOPHER MELISH JARRET	5TH APPLICANT
TENGWE ESTATE (PVT) LTD	6TH APPLICANT
FRANC FARM (PVT) LTD	7TH APPLICANT

And

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	1ST RESPONDENT
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	2ND RESPONDENT

THE MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION — **3RD RESPONDENT**

And

SOUTHERN AFRICAN LITIGATION CENTRE — **1ST AMICUS CURIAE**

CENTRE FOR APPLIED LEGAL STUDIES — **2ND AMICUS CURIAE**

JUDGMENT

The Court

[1] In this application the First and Second to Seventh Applicants seek declaratory relief relating to two decisions by the Executive to support a resolution suspending the operation of the Southern African Development Community Tribunal in 2011 and to sign the subsequent Protocol in 2014. The first decision was taken on 20 May 2011, when the President decided to support a resolution in effect suspending the

operation of this Tribunal, and the second decision was taken on 18 August 2014, when the President signed the relevant Protocol which limited the Tribunal's jurisdiction to inter-state disputes to the exclusion, henceforth, of private parties. The First and Second *Amici Curiae* support the application of the First Applicant albeit for different reasons.

All the parties before us filed detailed written Heads of Argument, for which we express our gratitude. They have been carefully considered.

[2] Before dealing with the crux of each party's argument, it is convenient to refer to the history of the Southern African Development Community Treaty in the present context, and the history of its Tribunal. This history has been set out in some detail by the Constitutional Court in ***Government of the Republic of Zimbabwe v Fick 2013 (5) SA 325 at 328*** and further, where the following was stated (with foot-notes omitted).

"The SADC and its legal instruments:

[5] SADC was established in terms of the Treaty of the Southern African Development Community (Treaty) that was signed on 17 August 1992 in Windhoek, Namibia, by the Heads of State or Government of ten Southern African States. Zimbabwe ratified the Treaty on 17 November 1992, as confirmed by its Attorney-General. And the Treaty came into force on 30 September 1993. 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.

[6] The purpose for the establishment of SADC was to achieve certain regional developmental goals. Some of the key objectives are set out in the Preamble to the Treaty as: a collective realisation of the progress and well-being of the peoples of Southern Africa; promotion of the integration of the national economies of Member States; the need to mobilise international resources and secure international understanding, support and cooperation; and, more importantly, "the need to involve the peoples of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the Rule of Law". Member States bound themselves in terms of article 4(c) of the Treaty to act in accordance with the human rights, democratic - and Rule of Law principles.

[7] They undertook to adopt measures to promote the achievement of the objectives of SADC and to "refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty." Added to this was the responsibility to take all the necessary steps to accord the Treaty the force of national law and a commitment to "cooperate with and assist institutions of SADC in the performance of their duties." One of those institutions to be cooperated with and assisted was the Tribunal.

[8] The Tribunal was established to ensure adherence to and the proper interpretation of the Treaty as well as the adjudication of such disputes as may be referred to it. The composition, powers, functions, procedures and other related matters were subsequently provided for in a Protocol pertaining to the Tribunal (Tribunal Protocol).

[9] The coming into effect of the Tribunal Protocol depended on its ratification by two-thirds of the Member States. It appears that the requisite number of ratifications was not obtained. As a result, the Tribunal Protocol did not come into operation. This hurdle was overcome through the amendment of the Treaty by the SADC supreme policy-making body known as the Summit, which comprises the Heads of State or Government of SADC Member States. It has the power to amend the Treaty. And such amendment

becomes operative only after adoption by the prescribed three-quarters of all Members of the Summit.

[10] The amendment alluded to above was effected by the Summit in terms of the Agreement Amending the Treaty of the Southern African Development Community (Amending Agreement). Article 16(2) of the Treaty was amended to provide for the Tribunal Protocol to be an integral part of the Treaty, obviously subject to the adoption of the Amending Agreement. This was notwithstanding the provisions of article 38 of the Tribunal Protocol which required ratification of the Tribunal Protocol by two-thirds majority before it could come into operation. This amendment, therefore, removed the ratification requirement.

[11] Consequently, the Amending Agreement came into force on the date of its adoption by three-quarters of all Members of the Summit. That happened on 14 August 2001 in Blantyre, Malawi, where it was signed by 14 Heads of State or Government including Zimbabwe and South Africa. Both South Africa and Zimbabwe are thus bound by the amended version of the Treaty which incorporated the Tribunal Protocol (Amended Treaty).

"Was the Treaty put into operation in terms of the Constitution?

[27] Our ***Constitution*** creates a mechanism in terms of which international agreements can be ratified or acceded to and domesticated. Section 231 of the ***Constitution*** provides:

"(1) the negotiating and signing of all international agreements is the responsibility of the national executive.

(2) 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).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the ***Constitution*** or an act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this ***Constitution*** took effect."

[28] The implications of compliance with this section were articulated by Moseneke DCJ and Cameron J in ***Glenister v President of the Republic of South Africa and Others*** as follows:

"Now plainly there are many ways in which the State can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the ***Bill of Rights***. This Court will not be prescriptive as to what measures the State takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt. A range of possible measures is therefore open to the State, all of which will accord with the duty the ***Constitution*** imposes, so long as the measures taken are reasonable.

And it is here where the courts' obligation to consider international law when interpreting the ***Bill of Rights*** is of pivotal importance. Section 39 (1) (b) states that when interpreting the ***Bill of Rights*** a Court 'must consider international law'. The impact of this provision in the present case is clear,

and direct. What reasonable measures does our ***Constitution*** require the State to take in order to protect and fulfil the rights in the ***Bill of Rights***? That question must be answered in part by considering international law. And international law, through the inter-locking grid of conventions, agreements and protocols we set out earlier, unequivocally obliges South Africa to establish an anti-corruption entity with the necessary independence.

That is a duty this country itself undertook when it acceded to these international agreements. And it is an obligation that became binding on the Republic, in the international sphere, when the National Assembly and the NCOP by resolution adopted them, more especially the UN Convention."

(Footnote omitted.)

[29] Zimbabwe argues that our Parliament did not approve the Treaty in terms of section 231 of the ***Constitution*** and that non-compliance is a bar to the enforcement of the costs order in South Africa. For these reasons, Zimbabwe concludes that orders of the Tribunal cannot be registered and enforced by South African Courts.

[30] This argument lacks merit. Our Parliament approved the Treaty in 1995. The Treaty and the Amended Treaty are thus binding on South Africa, at least on the international plane.

[31] Article 32(2) of the Tribunal Protocol imposes a legal obligation on South Africa to take all legal steps necessary to facilitate the execution of the decisions of the Tribunal created in terms of the Treaty that our Parliament has approved."

[3] For present purposes the following conclusion of the Constitutional Court is also relevant:

"[48]. The Tribunal had jurisdiction over all disputes relating to the interpretation and application of the Treaty and over disputes between Member States and natural or legal persons (we underline). This was subject to prior exhaustion of all available remedies unless otherwise domestically unavailable. Member States are required to take all measures necessary to ensure execution of the decisions of the Tribunal. Provision is also made for the enforcement of the decisions of the Tribunal, the role of Member States in that regard and the binding effect of those decisions. What all of these provisions boil down to, is that both Zimbabwe and South Africa effectively

agreed that domestic courts in the SADC countries would have the jurisdiction to enforce orders of the Tribunal made against them."

[4] The Constitutional Court also held [par. 69] that 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. This would be achieved by regarding the Tribunal as a foreign Court in terms of our common law. It also had to be emphasized that South Africa has an obligation to facilitate the enforcement of human rights related orders made against the State, including those stemming from the Amended Treaty, in accordance with international instruments which bind South Africa in terms of s. 231 of the ***Constitution***. The Tribunal Protocol itself, impose a duty on Member States to take all measures necessary to ensure the execution of the decisions of the Tribunal.

[5] In its written Heads of Argument, the First Applicant correctly sets out the broader facts relating to the First Protocol of the community and the suspension decision as follows:

"16. On 7 August 2000 the SADC passed the Protocol on the Tribunal in the SADC (the First Protocol). Former President Thabo Mbeki represented the South African Government.

17. The First Protocol did not restrict the ability of individuals to have access to the Tribunal. Article 15 stated that the scope of jurisdiction of the Tribunal is "over disputes between States and between natural or legal persons and States". Article 27 drew a distinction between the States and "other parties". The rules of the Tribunal which were an addendum to the Protocol defined an "Applicant" as "a person, member state or institution that has submitted an application to the Tribunal". "Person" was defined to mean "natural or legal person".

18. Rule 24 distinguished between Member States and other persons. It provided that Member States and Institutions shall be represented before the Tribunal by an agent appointed for each case. On the other hand, other persons were entitled to be

represented by agents or other persons were entitled to be represented by agents or other persons authorized by them. Rule 33, which governed proceedings instituted by way of application contained no restriction in relation to the standing of the person who could institute an application before the Tribunal.

19. As such, consistent with the terms of the Treaty, the First Protocol guaranteed access to any person to institute proceedings before the Tribunal. But in August 2010, with the attendance and participation of President Jacob Zuma, the first indication was given that this right of access to the Tribunal might be taken away.

20. In the meeting of Heads of State and Government, held in Windhoek, Namibia, between 16 and 17 August 2010, an item was presented concerning the non-compliance with decisions of the Tribunal. Item 9 of the Minutes of that meeting dealt with this issue. It was stated that in September 2009 at a meeting of the Summit held in Kinshasa in the Democratic Republic of Congo the subject of Zimbabwe's failure to comply with the decisions of the Tribunal was discussed. It had been resolved to ask the Committee of Ministers of Justice and Attorneys-General to hold a meeting on the legal issues regarding Zimbabwe and to advise the Summit. It was also asked that the Committee of Ministers of Justice and

Attorneys-General should "review the roles, responsibilities and terms of reference of the Tribunal".

21. When the meeting of August 2010 was convened, further "acts of non-compliance by the Republic of Zimbabwe with regard to the Tribunal's earlier decisions" were brought up. Notably the case ***Fick: LK and Others v The Republic of Zimbabwe (case number SADC (T) 01/2010)*** was presented. It established that Zimbabwe had not complied with decisions of the Tribunal. No reasons appear why Zimbabwe had not complied with decisions of the Tribunal. At any rate, decision 19 contains the resolutions of that meeting. It records:

"9.3 Summit endorsed the recommendation of Council in paragraph 9.3 not to reappoint members of the Tribunal whose term of office expires in August 2010, for another 5 (five) year term, pending the report of the Tribunal from Ministers of Justice and Attorneys-General.

9.4 Summit agreed that the members of the Tribunal shall remain in office pending the report on the Tribunal from Ministers of Justice and Attorneys-General but shall not entertain new cases until the extraordinary summit has decided on the legal status and roles and responsibilities of the Tribunal.

9.5 Summit deferred consideration of the non-compliance with the Tribunal ruling in ***Fick: LK and Others v The Republic of Zimbabwe (case number SADC (T) 01/2010)*** by Zimbabwe, pending the completion of a study on the role, responsibilities and terms of reference of the SADC Tribunal".

22. In respect of the report of the Ministers of Justice and Attorneys-General decision 20 was taken. In terms of this decision the following was resolved

"10.2 Summit decided that:

i. A study shall be undertaken and completed within six months of Summit meeting of August 2010, to review the role and responsibilities of the Tribunal;

ii. The Committee of Ministers of Justice or Attorneys-General shall involve members of the SADC Tribunal in the study;

iii. The outcome of the study shall be presented by the Committee of Ministers of Justice or Attorneys-General at an extraordinary summit".

23. It shall be recalled that the appointment of the Tribunal is not discretionary, but obligatory under Article 16. Similarly, the appointment of members to the Tribunal is mandatory.

24. The decision to suspend the appointment of members of the Tribunal was extraordinary. Its effect was that the Tribunal could not function. Yet, the South African Government sought no parliamentary approval prior to its participation and endorsement of the decision. This was despite the fact that the Government knew that the appointment of members to the Tribunal was mandatory.

25. The matter was tabled again at a further meeting of the Heads of State in May 2011. Since it is this decision that is the subject matter of the present dispute, it must be quoted in full.

> "3.2.2 Re-appointment and replacement of members of the SADC Tribunal
>
> 3.2.2.1 Summit recalled that, at its meeting held in Windhoek, Namibia, in August 2010, it;
>
> (i) endorsed the Council's recommendation not to reappoint members of the Tribunal whose term of office would expire in August 2010, for another five year term, pending the report on the Tribunal from the Committee of Ministers of Justice/Attorneys-General; and

(ii) decided that the members of the Tribunal should not entertain any new cases until the extraordinary summit has decided on the legal status and roles and responsibilities of the Tribunal.

3.2.2.2 Summit noted that, the Committee of Ministers of Justice/Attorneys-General, at its meeting held in Swakopmund, Namibia, in April 2011, noted that the study on the role, responsibilities and terms of reference of the SADC Tribunal had been finalised. The study confirms the validity of the Protocol on the Tribunal and the rules of procedure thereof, and that the Tribunal is properly constituted.

3.2.2.3 Summit noted that, in terms of Articles 6 (1) and (2) of the Protocol on the Tribunal and the rules of procedure thereof, members shall be appointed for a term of five years and may only be appointed for a further term of five (5) years.

3.2.2.4 Summit also noted that:

(i) Out of the members initially appointed, four were selected through a lot that took place on 31 October 2008 and their term of office shall expire at the end of three years after the selection;

(ii) Currently some of the members' tenure of office has either expired on 31 August 2010, or it will expire on 31 October 2010; and

(iii) There is need not only to reappoint the members whose term expired in August 2010, but also to replace those members whose term of office will expire on 31 October 2011.

3.2.2.5 Summit considered the recommendation of Council not to approve the reappointment and replacement of the members of the SADC Tribunal pending the conclusion of the review process referred in paragraph 2.2.1.5 above".

26. Two decisions were then taken. First, it was decided not to reappoint the members whose term of office expired on 31 August 2010. Second, members whose term of office would have expired on 31 October 2011 were not reappointed. While the

Respondents argue that President Zuma was not present at the meeting of May 2011, they admit that he was duly represented and the decision was taken on his behalf. The Respondents have characterized the decision of May 2011 as the "suspension of the SADC Tribunal". This characterisation is correct. Without Judges, the Tribunal could not function. It was thus suspended."

The Second Protocol:

[6] The review by SADC of the functioning of the Tribunal resulted in the conclusion of a new Protocol on the Tribunal, which was signed on 18 August 2014. The First Respondent is signatory to this Protocol on behalf of South Africa. This Protocol is a significant departure from the First Protocol. Article 33 deals with material jurisdiction and provides that the Tribunal will have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between member States. The result is that individuals are precluded from lodging disputes before the Tribunal. Only member States can. According to the First Applicant, this lies at the heart of the second issue to be decided. They contend that it was

unlawful for the South African Government to sign this Protocol that infringed the ***Constitution***.

[7] In a joint submission, the parties referred to the following undisputed facts:

1. The 2014 Protocol was adopted by the Summit in terms of a consensus decision in which the President participated, and the President signed the 2014 Protocol after its adoption;
2. There was no public consultation process which preceded the President's signature of the 2014 Protocol;
3. There has not yet been ratification by Parliament of this Protocol pursuant to the President's signature;
4. The President, Cabinet and other Government Respondents await the outcome of this application to decide whether to seek Parliament's ratification of this Protocol.

The Law Society's argument:

[8] The First Applicant's argument can be summarized as follows:

1. The President's impugned conduct violates s. 34 of the ***Constitution***;
2. The President's impugned conduct is otherwise unconstitutional, *inter alia* for failing to facilitate any prior consultation, and refusing to furnish any information or reasons despite repeated requests;
3. The President's impugned conduct is also inconsistent with the duties of SADC member states under the SADC Treaty itself;
4. The Respondents' defences are technical and untenable.

[9] The First Applicant therefore sought the following relief as per its Notice of Motion:

"1. It is declared that the Respondent's participation in suspending the SADC Tribunal and his subsequent signing of the 2014 Protocol on the SADC Tribunal is declared unconstitutional."

[10] It was argued that: the President's decisions are unconstitutional and in conflict with the Founding Treaty. The SADC Treaty is binding in the Republic, as the Constitutional Court has held. The Treaty establishes the Tribunal as the prime instrument to ensure compliance and adherence to the terms of the Treaty. The Treaty also specifies the obligations of Member States. Those obligations cut across the State and individual divide. Member States have direct obligations towards any person in their territories. Member States are also duty-bound to comply with the principles of democracy, human rights and the Rule of Law. They are also under an obligation not to discriminate against any person on the grounds as listed.

[11] The Tribunal, being the key institution to ensure compliance with the terms of the Treaty must therefore be established and its members must be appointed. The failure to appoint members and to establish the Tribunal is itself an infringement of the terms of the Treaty. The Heads of Government are only entitled to decide the term of Office of a particular Judge, and they are not entitled to decide whether or not to establish the tribunal or whether to appoint Judges to the Tribunal. Once

appointed, the Tribunal is bound to hear cases which fall within its jurisdiction. If member States detract from the norms contained in the Treaty, the only Organ with the institutional power, authority and jurisdiction to ensure compliance is the Tribunal itself. According to the First Protocol, and its articles 15 and 17, the scope of jurisdiction of the Tribunal was "over disputes between States and between natural or legal persons and States". The only limitation was that contained in art. 15.2 in terms of which no natural or legal person could bring an action against the State without first exhausting internal remedies.

[12] The decisions of May 2011 were material. Firstly, Judges were not appointed. Secondly, the Tribunal was suspended. No Protocol or Treaty was concluded in this regard. South Africa was a party to this decision and endorsed it. The decision had the effect of suspending the continued operation of the material terms of the Treaty and the First Protocol.

The question therefore arose whether it was constitutionally competent for the South African Government to take an executive decision whose effect was to suspend South Africa's obligations under an International Treaty.

The provisions of s. 231 of the ***Constitution*** are relevant in this context:

In ***Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC)***, it was held that the main force of s. 231 (2), is directed at South Africa's legal obligations under International Law. An international agreement approved by Parliament becomes binding on the Republic. South Africa may therefore not act contrary to its binding obligations. In the context of the ***Glenister*** decision ***supra***, and with reference to the provisions of s. 7 (2) of the ***Constitution***, it was stated that Government must act reasonably in fulfilling its international obligations.

[13] The question therefore arose, in the present context, whether the President acted reasonably when endorsing the suspension of the Tribunal. It was contended that he did not do so and hence acted unconstitutionally. South Africa is bound by the Treaty and the First Protocol. The two instruments have been made binding

through the process envisaged by s. 231 of the ***Constitution.*** The decision to endorse the suspension of the Tribunal was in conflict with binding obligations of South Africa. It was submitted that the President cannot perform an act on an international plane that would be inconsistent with such legal obligations. Should he do so, he would act unreasonably. With reference to ***National Commissioner of Police v Southern African Human Rights Litigation Centre and Another 2015 (1) SA 315 (CC) par. 37 to 40***, it was contended that the relevant *dicta* were to the effect that the Executive lacks authority to conduct itself at an international level in a manner that is in conflict with its binding Treaty obligations. Reasonableness in that context entails the obligation that there must be a justifiable basis for decisions of the Government. In the present instance, so it was submitted, there was none.

[14] In the Answering Affidavit of the Respondents, the justification was offered that "the view taken by the President after consultation with his advisors and all 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". The President stated that he did not oppose the consensus view taken by the Summit on the recommendation of the Council of Ministers to put in place a partial moratorium for a limited duration. The final decision taken during May 2011 was made by a consensus. The consensus decision of the Summit took into account the interests of the majority of member States on this issue.

[15] It was accordingly contended that this reasoning was flawed, irrational and unreasonable. The Council of Ministers and Attorneys-General had resolved that the jurisdiction of the Tribunal was not inconsistent with the mandate of the Tribunal in accordance with the Treaty. The relevant Committee of Ministers of Justice and Attorneys-General had noted at its meeting in April in 2011 that the Protocol on the Tribunal was valid as well as the rules of procedure thereof and also that the Tribunal had been properly constituted. It is notable that this report did not make any mention of any concerns raised by "certain Member States" as contended for. It can

be stated however that the only issue, in our view, which appears to have instigated the review of the Treaty was the apparent non-compliance with judgments of the Tribunal by Zimbabwe in the context of the so-called "land-reform" that the Constitutional Court in the *Flck* decision *supra* [par. 3] referred to. (at p. 328) The record clearly indicates that this was the main issue that confronted the Member States. The applicant argued that there was no factual foundation to suggest that several Member States had raised concerns about the jurisdiction of the Tribunal. There was therefore, so the argument continued, no rational basis for the President to support the decision suspending the operation of the Tribunal and the President's pleaded reasons were not supported by the record submitted. Accordingly, it was contended that the President laboured under a complete misapprehension as to the correct facts or misconstrued the correct facts.

[16] The applicant contended further that it could therefore not be argued that his decision bore a rational relationship to the purpose for which the power of the Executive was conferred and the decision therefore failed the rationality test that

applies as clearly held by the Constitutional Court in ***Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 at par. 27.*** It was made clear by the Court that the Executive could exercise no power and perform no function beyond that conferred by law and that the power must not be construed. Any such decision must also be rationally related to the purpose for which the power was conferred, otherwise the exercise of such power would be arbitrary and at odds with the Constitution.

The 2014 Protocol - In conflict with binding international obligations:

[17] Under this heading it was contended by the First Applicant that the singular feature of the 2014 Protocol was to alter the jurisdiction of the Tribunal so that no individual or private party could lodge disputes with the Tribunal. The jurisdiction of the Tribunal was hence restricted to disputes between member States and disputes between States and SADC itself. What was challenged under this heading was the participation of the President in signing the Protocol. It was clear that the Treaty entitled individuals access to the Tribunal if principles of human rights, the Rule of

Law and democracy were infringed by States. Both the Treaty and the First Protocol are binding in South Africa since the provisions of s. 231 of the ***Constitution*** were complied with in bringing them into operation. Although they both remain binding, the Executive has effectively attempted to undo obligations of South Africa under those Treaties. The Executive had no power to act as it did. It was clear from ***Democratic Alliance*** decision *supra* (at par. 43), that the exercise of all public power, including conducting international relations must comply with the ***Constitution.*** Their withdrawal from a binding International Treaty was an executive act which constituted the exercise of public power and was therefore subject to constitutional control by means of the principle of legality.

[18] A statement by the Executive that it no longer intended to be bound by its international obligations by means of depositing notification has concrete legal effects in international law "as it terminates Treaty obligations, albeit on a deferred basis". It was therefore contended that the combined effect of South Africa's participation in the 2011 decision and the August 2014 decision, was to suspend

South Africa's obligations in international law, contrary to the provisions of the Treaty and the First Protocol. This took place without the approval of Parliament. In the ***Democratic Alliance*** decision *supra* (par. 51) the following was said: "It should also be borne in mind that prior parliamentary approval is required before instruments of ratification may be deposited with the United Nations. From that perspective, there is a glaring difficulty in accepting that the reverse process of withdrawal should not be subject to the same parliamentary process.

[19] The necessary inference, on a proper construction of s. 231, so the applicants argued, is that Parliament retains the power to determine whether to remain bound to an International Treaty. This is necessary, so the argument goes, to give expression to the clear separation of powers between the National Executive and the legislature embodied in this section. If it is Parliament which determines whether an international agreement binds the country, it contended that it is constitutionally untenable that the Executive can unilaterally terminate such agreement". It was therefore argued that if it is accepted that South Africa's participation in the two

decisions constituted the effective abolition of South Africa's obligations in international law, that decision should have been endorsed by Parliament before it could have any effect. It was thus argued that it is no answer for the Government to argue that the 2014 Protocol was yet to be ratified by Parliament. The fact was that South Africa remained bound by the Treaty and the First Protocol. Without terminating the First Protocol, the Executive has no authority to participate in a decision in conflict with South Africa's binding obligations. If it was the intention of South Africa to withdraw from its obligations, both under the Treaty and the First Protocol, it should have obtained Parliamentary endorsement first. On this basis its failure in this regard was fatal to its case.

Procedural irrationality:

[19] It was contended that the 2014 decision was also irrational on procedural grounds. While the role of South Africa on an international level was plainly a policy issue, it was not unconstrained. The ultimate authority resided with Parliament and

when Parliament exercises its legislative power, it is bound by the requirement to ensure public participation in its decisions.

See: ***Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 CC at par. 61.***

It was contended that taking into account the following special considerations in this particular case, public participation was necessary for the rationality of the decision:

1. The special significance of public participation;
2. The effect of the decision on rights conferred;
3. The nature of the power being exercised; and
4. The constitutional provisions which impose Parliament as the body with the last word on Treaty making.

[20] These factors, it was contended, show that it was especially important that any decision that would endorse the suspension of a body such as the Tribunal, must have been preceded by a public consultation process. It was noticeable that the Executive had provided no reasons why it did not engage in the public consultation--

process before the decision was taken. It seemed that it was content with the argument that because a decision was of an executive nature, there was no duty to consult. The premise of this argument was flawed, so it was said, because a duty to consult was triggered by the nature of the decision and its public significance.

[21] The applicant pointed out that the Government itself acknowledged that the effect of the decision was to deprive South Africans their entitlement to access the Tribunal. That entitlement was granted when the Treaty was signed, and indeed when the First Protocol was passed in terms of s. 231 ***Constitution***. As such, South Africans became entitled to certain rights conferred by the Treaty and the Protocol with effect from 2000. Those rights became exigible at the instance of any person on South African soil. Those rights could not be taken away at the whim of the Executive without public consultation. It did accordingly not avail the Government to argue that the provisions of s. 34 of the ***Constitution*** do not guarantee access to the SADC Tribunal. The issue, it was contended, is not whether s. 34 of the ***Constitution*** guarantees such access, but the issue is simply that access to the

Tribunal is guaranteed by the Treaty and the First Protocol. Both of these are binding and this is clear from the *Fick* decision *supra*. The impugned decisions were therefore unconstitutional.

[22] In the context of the State Respondents' defences that in respect of the 2011 decision an undue delay has occurred, Applicants point out that this decision continues to have operative effects to date. Furthermore, the applicant points out that there was a lengthy exchange of correspondence between it and the Government and that had the application been brought before the 2014 decision, most probably the criticism would have been that the first decision was of a temporary nature and that any application prior to the 2014 decision would have been regarded as being premature by the Respondents. As far as the defence of prematurity in respect of the second decision is concerned, Applicants argued that while Parliament may well deliberate in the future, whether to endorse the decision or not, this would have no bearing on whether the decision has any legal effects.

[23] The applicant contended that in International Law the decision of the Government applies. Parliament's role is not to decide whether or not South Africa is bound on the international plain. Its decision will merely concern whether or not the particular decision taken by the Executive will also be binding in the Republic. Whether or not South Africa is entitled to participate in the decision to reconstitute the Tribunal in breach of South Africa's international obligations is plainly a matter that falls within the parameters of the principle of the Rule of Law. It was therefore open to this Court to decide whether or not the conduct of the Government violated the ***Constitution***.

The Second to Seventh Applicants' argument (The Tembani Applicants):

[24] On behalf of these Applicants it was pointed out that the principles of SADC law confirmed by the Tribunal were consistent with international law and South African law. They include the well-established principle also recognised by the South African Constitutional Court that "the concept of the Rule of Law embraces at least four fundamental rights, namely, the right to have an effective remedy, the right to

have access to an independent and impartial Court or Tribunal, the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation, the right to equal treatment before the law and the right to equal protection of the law".

See: ***Zondi v MEC for Traditional and Local Government Affairs 2005 (3) SA 589 (CC) at par. 82.***

[25] These applicants contended that the Tribunal also confirmed a principle previously articulated by the African Commission in litigation concerning Zimbabwe.

See: ***Gondo v Republic of Zimbabwe SADCT 05/2008.***

_It is that the Rule of Law is a necessary condition for human rights, and that it requires the existence of Courts and Tribunals to resolve disputes. Reference was made to ***Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa (on behalf of Andrew Barkley Meldrum) Zimbabwe 294/04***, where the African Commission held that when the Zimbabwean Government refused to comply with certain High Court orders, it undermined the independence of

the Courts which was a violation of art. 26 of the African Charter. It also found as a fact that Zimbabwe "persistently flouted orders of its own High Court".

[26] It was further pointed out that the SADC Tribunal also confirmed the legal principle, namely that the SADC Treaty itself, through art. 4, which entrenches human rights and the Rule of Law, imposes a "legal obligation" on SADC "as a collective and as individual Member States". The Tribunal also subsequently reiterated that art. 6 (1) of the Treaty similarly imposes an obligation on Member States of SADC to respect, protect and promote the "twin fundamental rights", being "the right of access to the Courts and the right to a fair hearing".

See: ***Campbell v Republic of Zimbabwe SADCT 03/07.***

Thus, contended the Tembani applicants, this obligation therefore rests on member States and their functionaries, and is not only exigible collectively against Heads of State acting collectively *qua* SADC Summit.

[27] It was further contended by the Tembani applicants that the source of the Tribunal's jurisdiction to determine disputes between individuals and States is art. 4 (c) of the SADC Treaty itself. This was reinforced by art. 6 (1) of the Treaty and comparative authority as confirmed and applied by the Tribunal. In ***Campbell supra***, the Tribunal also held that depriving citizens of judicial protection is "inimical to the principle of the Rule of Law" and the Rule of Law indeed requires "having access to the Courts" and the Rule of Law therefore precludes limitations on the international human right to have any claim brought before a Court or Tribunal restricting or reducing "the access left to the individual in such a way or to such an extent that the very essence of the right is impaired".

[28] The Tribunal, it was pointed out, also adopted a ***dictum*** of the ***House of Lords In Jackson v Attorney-General UKHL (2006) 1 A.C. 262 at par. 159***, where the following was said: "The Courts will treat with particular suspicion (and might even reject) any attempt to subvert the Rule of Law by removing governmental action affecting the rights of the individual from all judicial scrutiny". It was therefore argued

that In respect of the State Respondents' point of prematurity, this dictum made it clear that it is not only inclusive and concluded subversions of the Rule of Law which attract Courts' scrutiny. Any type of conduct, even only an inchoate attempt, is justiciable. In the context of the ***Campbell*** decision ***supra***, and its ***sequelae*** it is obvious that if an attempt to become justiciable only after it is choate, then the attempt would have already destroyed an individual's ability to initiate judicial scrutiny.

[29] Accordingly, argued the Tembani applicants, it is clear from the ***sequelae*** of the ***Campbell*** judgment, which the Zimbabwean Government ignored, that the SADC Summit, in issuing the 2014 Protocol, acted contrary to the advice by the SADC Ministers of Justice and Attorneys-General. These instances had adopted a consultant's report to the effect that the SADC Tribunal had correctly applied the law and that its orders should be respected and enforced. In the context of the consensus decision-making process, the expert report recorded that this actually meant that "any SADC member State is able to veto a Summit decision unless the

Treaty provides otherwise". Accordingly, the First Respondent was not a victim of a consensus decision. The roles were in fact inversed, he created consensus by not exercising his veto powers. It is also noteworthy that the SADC Tribunal's own Judges described the Summit's actions against the Tribunal as "illegal and arbitrary" and "taken in bad faith". This was said after the SADC Tribunal was approached by some of the Second to Seventh Applicants to review and set aside the purported suspension of the Tribunal's jurisdiction. However, by the time the application could be lodged, the Tribunal had already been disabled by the SADC Summit. It could therefore not rule on the illegality of the action and the Judges' observation was therefore made *extracurially*.

[30] Having been unable to gain access to the Tribunal, to rule on the interference with its jurisdiction, these Applicants thereupon lodged a case in the African Commission. This too resulted in a judgment which defeated the First Respondent's defence based on collective conduct. South Africa did however not oppose the ***African Commission*** case which was based substantially on the same causes of

action involved in the present application. The African Commission however ruled that it only had jurisdiction over member States and with reference to art. 7 and 26 of the African Charter it held that these provisions entrenched only the right to access to justice before national Courts.

The result is that the SADC Heads of State are not capable of being held collectively accountable *qua* SADC Summit before any international forum. Therefore individual accountability of each Head of State must necessarily exist at the national level.

[31] The Tembani Applicants' causes of action are that the President's signature is contrary to the SADC Treaty, retrospectively affects vested rights and is furthermore irrational, arbitrary and *mala fide*. It was contended that none of the Respondents' Answering Affidavits addressed any of the issues invoked by these Applicants.

Violation of the SADC Treaty:

[32] The Tembani Applicants say that this very first issue raised in their Founding Affidavit was not addressed at all by the Respondents. This involves the violation of

the SADC Treaty itself. This Treaty establishes the Tribunal as an integral Organ of SADC. Article 9 (1) (g) of the SADC Treaty makes this clear. The Treaty also provides in art. 16 (1) that it is a function of the Tribunal to ensure adherence and the proper interpretation of the Treaty. Decisions by the SADC Tribunal are also final and binding according to art. 16 (5). The Treaty also provides that "human rights, democracy and the Rule of Law" are founding principles, and that SADC and its member States "will act in accordance with them", according to art. 4 (c). Member States are also precluded from "taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty". See art. 6 (1) "furthermore, member States are obliged to cooperate with and assist institutions of SADC in the performance of their duties", according to art. 6 (6).

[33] It was therefore contended that any act which detracted from the SADC Tribunal's exercise of its human rights jurisdiction at the instance of individuals is

inconsistent with the SADC Treaty itself, and violates the Rule of Law. The President's signature of the 2014 Protocol was such an act.

It was further submitted that any Protocol to the SADC Treaty is a subordinate legal instrument. It may not permissibly emasculate a SADC Organ established by the Treaty itself. It was contended that the desired result was illegally contrived through an attempt to repeal and replace the 2000 Protocol on the Tribunal by the 2014 Protocol.

[34] The President's signature, so the Answering Affidavit states, was "intended to demonstrate that South Africa was open to considering the ratification of a Protocol", which terminated the human rights jurisdiction which the Tribunal conclusively held the SADC Treaty vested in it. It was contended by the Tembani applicants, that at the very least this signature, on the President's own version, signalled South Africa's participation in an initiative of the Zimbabwean Government to undermine an essential SADC Institution's ability to enforce a fundamental SADC objective: compliance with the Rule of Law and human rights.

It was therefore submitted that the Tembani Applicants had established their first cause of action, even on the First Respondent's own version, which does not even attempt to refute the founding papers on this issue.

Retrospective interference with vested rights:

[35] A submission was further that this second issue was also not addressed by the First Respondent. The Tembani Applicants and others, whom they represent, had vested rights in the SADC Tribunal awards. The enforcement of these awards is provided for in the Treaty itself as per art. 32, and in the 2000 Protocol as per art. 32 (4) and (5). By frustrating and terminating access to the Tribunal, vested rights had been interfered with retrospectively. In all of this, the First Respondent participated on his own version. Nothing in the Answering Affidavit meets this challenge, and where no case is made out in the Answering Affidavit, it could not be done in argument.

Irrationality and arbitrariness:

[36] It was contended that this ground was the only one which the First Respondent purported to meet. As a matter of law, if the President's signature cannot rationally be related to a legitimate Government purpose, authorized by s. 231 (1) of the Constitution and the SADC Treaty, then the President acted irrationally. These applicants pointed out that in ***Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC) at par. 51***, it was held that where a "decision is challenged on the grounds of rationality, Courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved". In ***Democratic Alliance v Minister of International Relations and Cooperation*** *supra* at ***par. 64*** and ***Kaunda v President of the Republic of South Africa 2005 (4) SA 235 (CC) at 79 to 80***, it was also held that rationality is an entry-level requirement for any exercise of public power, this is also so where the power relates to engagement in foreign relations. In ***Fick supra***, at par. 39, the Constitutional Court also held that the South African ***Constitution*** promotes democracy, human rights and the Rule of Law, as does the SADC Treaty which

similarly entrenches these principles, and also imposes an obligation on member States to promote them. Accordingly, so it was argued, the President's signature cannot be connected to the promotion of any of these principles. It was therefore contended that nowhere in the Answering Affidavits has it been suggested that signing the 2014 Protocol could conceivably be connected to any of these principles.

[37] Factually therefore, so it was argued, the irrationality of the signature was therefore self-evident. The Tribunal's jurisdiction was simply signed away, contrary to the advice of the Ministers of Justice and Attorneys-General and contrary to the recommendation of the independent expert appointed to conduct the review of the Tribunal.

This, it was submitted, was clearly arbitrary and irrational. The clear illegality is aggravated by the fact that it was not even the SADC Treaty which was purportedly amended, but merely the subordinate Protocol on the SADC Tribunal. It was therefore at the very least irrational to even merely append a signature to a Protocol

which impeded the Tribunal's jurisdiction. It was furthermore so in circumstances where no alternative had been provided to people with vested rights for the Tribunal and without consulting them. Nor could there be any rational justification for ousting access to the Tribunal to the bearer of human rights.

[38] The question arose: how would this fundamental element of the Treaty hence be enforced? It could not be exclusively enforced in domestic Courts in that this would be entirely contrary to the SADC Treaty itself, as well as the dual obligation of South Africa under international as well as domestic law. Also, on the facts it has proved impossible. Zimbabwe, the procurer of the Tribunal's demise, had already ousted its domestic Courts' jurisdiction to entertain certain human rights violations. The 2014 Protocol completed the ouster of this human rights jurisdiction and this is a matter which was either entirely absent from the President's mind, or which he condoned. The answering papers fail to address this topic altogether. In the context of the argument of the First Respondent, that consensus formed the basis for the relevant decisions, it was contended that this was a circular argument and therefore--

irrational. Consensus existed because the President agreed. His agreement however preceded the consensus and was therefore a *condictio sine qua non* for such. Consensus could therefore not be raised as a rationale. It is clear from the ***Democratic Alliance*** decision *supra* at par. 34, that both the process by which the decision was made, and the decision itself, must be rational. The same was held in ***Minister of Home Affairs v Scalabrini Centre 2013 (6) SA 421 (SCA) at par. 69.*** The submission was therefore that it was clear from the process that the interest of rights bearers under the Treaty and the Tribunal's orders where the victims of human rights abuses were not taken into account. Neither was the Rule of Law, the South African ***Constitution*** or even the Constitutional Court's judgment in ***Fick*** ***supra***. (delivered on 27 June 2013).

[39] It was also contended by the First Respondent in the Answering Affidavit that the signature to the Protocol would not bind South Africa, nor was it intended to do so. This is however not the effect of s. 231 (3) of the ***Constitution***, which provided that a Treaty like the Protocol indeed bound South Africa on its mere signature. This

rationale was self-defeating. It created an effect which the President's deponent now avers he did not intend. This means that the signature is in any event irrational and arbitrary, because there is no connection between intention and effect. Nor is there any connection between the intention expressing comity and respect for SADC and its member States and the empowering provision s. 231 (1) of the ***Constitution***, which also advises the President to sign international instruments. It is s. 84 (2) (h) and (i) of the ***Constitution*** which confer on the President's responsibility for diplomatic recognition, comity, respect or graces. Furthering diplomatic relations is not a constitutionally authorized purpose to be fulfilled through signing Treaties under s. 231 (1) of the ***Constitution.***

[40] It is also clear according to the Tembani Applicants that the President's signature did not "ensure respect for an institution". In fact it severely undermined a crucial SADC Institution, the Tribunal. In so doing it detracted from SADC's own stature and institutional accountability and violated the SADC Treaty itself. There was also no suggestion that any of the six States which did not sign the Protocol

undermined "the ongoing political and economic integration" of SADC, or convey their disrespect for SADC or a SADC Member State by not signing the 2014 Protocol. The contention therefore that the President's signature "furthered" these considerations by signing the Protocol, was unsubstantiated and unfounded. It was submitted that it was a further example of the Presidency's previous unsuccessful attempt to invoke diplomatic, political and policy casuistry to defend it - to Zimbabwe as clearly appears from the decision in ***President of the Republic of South Africa v MG Media Ltd 2015 (1) SA 92 (SCA) at par. 29 to 30***. It was also inconsistent with the constitutional recognition in *Fick supra* of the objectives of SADC. The Constitutional Court's judgment in this case demonstrated in fact the rationale for individual access to the SADC Tribunal. It was specifically held that the Tribunal "was created to entertain, among other issues, human rights related complaints, particularly by citizens against their States", according to the Constitutional Court. The Tribunal is an essential SADC Organ and it is the only overseer of certain material founding principles of the SADC Treaty, namely the Rule of Law and human rights.

The prematurity defence:

[41] It was contended that even if prematurity had been properly established in the affidavits, the Respondent accepted that this Court would have to exercise a discretion whether or not to uphold the point. Respondents contend that this discretion is "informed" by the fact that s. 231 of the ***Constitution*** requires executive action first, and legislative action later. It was submitted that this is the wrong approach. Section 231 (1) conferred an exclusive power on the National Executive. Ratification is an executive act and not a legislative competence. No legislative action is required by Parliament under the Protocol. The Protocol is of a technical, administrative or executive nature and does not require parliamentary approval. The second issue which "should inform" this Court's discretion, so the Respondents contend, is that the Court entertaining the merits might "run the real risk of pre-judging and pre-empting the constitutional competence entrusted to Parliament to consider whether to approve this international agreement".

This is an incorrect legal supposition. Because of the nature of the Protocol, the ***Constitution*** "entrusts" the "competence" to the Executive. No constitutional responsibility on the part of Parliament exists.

[42] The third issue was a suggestion that "exceptional circumstances" had to be established before pre-empting "any consideration by Parliament". This too, has been over-taken by the actual factual situation subsequently disclosed. It is that the Executive did not actually intend to present the Protocol to Parliament for its approval. That is why this had not happened in the time since signature. It is clear that no decision had been taken to place this Protocol before Parliament for approval. The Respondents also confirmed that they have no intention of obtaining any parliamentary approval before this Court's determination of this matter.

[43] In our view if, exceptional 'circumstances' are required, the Tembani Applicants have demonstrated the existence of such. Nine of the required 10 signatures to the Protocol have already been provided and it was therefore critical

that the legality of signing the Protocol be established and that the First Respondent's signature be removed. Each of the issues which the Respondents invoke in this context actually support a discretion that this Court ought to exercise in favour of entertaining the application, even if it were indeed to have been "premature". The reliance on the "separation of powers issue" is legally misconceived, Courts must assert their authority whenever it is constitutional permissible to do so, irrespective of the issues who is involved.

See: ***Economic Freedom Fighters v Speaker, National Assembly 2016 (3) SA 580 (CC) at par. 93***. At present there is no extant parliamentary process. The application also does not seek to prescribe anything at all to Parliament. Parliament is not sited and no relief is sought against it. In the present case, the Court is merely asked to fulfil the authority entrusted exclusively to the judiciary: the determination of issues of legality.

[44] It was also contended by the applicants that the point was obstructionist. It only existed because the President never sought the parliamentary approval which

was now contended on his behalf was required. We agree and we point out that the point was also inconsistent with a binding precedent. In ***Democratic Alliance supra***, a Full Court of this Division rejected such an argument. It held that the Court was not concerned with what Parliament "might or might not do in future". The Court was concerned with the question whether another arm of Government, the Executive, had "already acted unconstitutionally". On this basis alone the Court was not only entitled, but constitutionally joined to enquire into the conduct of the Executive. Seeking to "oust" the Court's jurisdiction by invoking prematurity was "not permissible", the Full Court held.

[45] The same applies *a fortiori* in this case. As contended by the applicants, this is so because there is no eminent parliamentary process at all. It is clear from other decisions of the Constitutional Court in any event, that where constitutional rights threatened, it was not necessary to await the implementation of the measure before approaching a Court.

See: ***Abahlali Base Mjondolo Movement SA v Premier of the Province of Kwa-Zulu Natal 2010 (2) BCLR 99 (CC) at par. 14***; and ***Jordaan v City of Tshwane Metropolitan Municipality [2017] ZACC 31 (29 August 2017) at par. 6.***

It was correctly contended, in our view, that this case was not concerned with prospective, hypothetical or abstract events. It is concerned with the *premature* signing of the 2014 Protocol. This has occurred and the First Respondent himself now contends that the outcome of this case is awaited to inform his decision whether or not to seek parliamentary approval. There was therefore no prematurity or un-ripeness. Serious illegality, which no parliamentary process can ever purge, even were any ever to be pursued, vitiated the President's signature, and therefore overwhelming national and international public interest, and the compelling interests of justice warrant exercising this Court's discretion in favour of hearing the matter, even were there to have been any degree of prematurity.

Collective (non) accountability?

[46] It was submitted by the applicants that it was not open to the President to disavow individual accountability or to invoke consensus decision-making. His consent preceded consensus and depends on him not exercising veto powers. The Constitutional Court has also made the President's individual responsibility for the exercise of powers vested in the National Executive quite clear. See: ***Economic Freedom Fighters v Speaker, National Assembly supra*** at par. 20. It is clear that the President's responsibility is to respect the ***Constitution*** and the Rule of Law in the exercise of every public power. In exercising powers vested specifically in the National Executive, by s. 231 (1) of the ***Constitution*** (as the Respondent concedes), the President attracts judicial scrutiny of his own "election" to sign a Treaty. This is so because it was held in ***Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC) at par. 89***, the separate, executive conduct of signing an international agreement under s. 231 (1) of the ***Constitution*** creates its own "different legal consequences".

The remedy:

[47] The submission was that the correct legal position was well established: a declaratory order of invalidity was mandatory and appropriate and effective consequential relief is constitutionally required. See: ***Economic Freedom Fighters supra at 103*** and ***Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) at par. 69***. On the Respondents' pleaded case the signature was merely a formal act and on that basis it is quite capable of being retracted by formal communication to SADC Secretariat. In the ***Democratic Alliance*** decision ***supra***, a Full Court of this Division has already held that the withdrawal of an impugned notice constituted just and equitable relief (at par. 81). The equivalent relief in the circumstances of this case was therefore an order directing the withdrawal of the President's signature. It was also contended that as regard costs, the President's conduct in this litigation has been shown to have been oppressive and unreasonable. It was therefore just and equitable that the Tembani Applicants should be awarded their costs, both in respect of the main application and the belatedly – conceded intervention

application. In respect of the latter, the Attorney and client scale would be appropriate.

The Centre for Applied Legal Studies' argument:

[48] The argument raised by the Centre is

[48.1] The effect of signing an international instrument that can bind South Africa, will always have serious and practical consequences, and generally presents Parliament with a fait accompli regarding a treaty's terms;

[48.2] Comparative practice supports the proposition that a final public consultation process is both practical and desirable before the Executive signs treaties;

[48.3] Under South African law there exists a default obligation on the National Executive to consult prior to signing a treaty. This flows from:

(a) The participatory nature of the South African democracy;

(b) The principle of legality and the requirement of procedural rationality; and

(c) Section 7 (2) of the ***Constitution.***

[49] It should be noted at this stage that the last mentioned proposition was not supported by any of the Applicants, nor did they seek such relief. It is neither necessary, nor desirable for this Court to make such a wide-ranging finding on the facts of the present matter. Context is everything in law, and there may well be instances where prior consultation is neither necessary nor desirable. The content of any obligation to consult may vary from case to case as well. Added to this is the obligation of a Court not to exceed its powers by entering the decision-making processes of the Executive unduly, and certainly not by issuing an order that would bind the Executive authority irrespective of the facts of each particular case. The principle of separation of powers would prohibit this type of approach.

See: ***Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC) at par. 37***, and ***Electronic Media Network Ltd v e.tv (Pty) Ltd 2017 (9) BCLR 1108 (CC).***

[50] As far as comparative practices and regional instruments are concerned, they indeed show a welcome tendency to support the resolution of human rights disputes. It is also a fact in a number of instances. National documents require the Executive to consult before signing a treaty. For present purposes a discussion is not necessary. It is a topic that could well be addressed by the legislature, namely, how the values are protected in the domestic law-making process are also (or should also) be protected in the international law-making process. On this topic useful reference can be made to the 1997 ***New Zealand Law Commission*** report titled "***The Treaty Making Process: Reform and the Role of Parliament.***

For present purposes it is not necessary to decide whether s. 7 (2) of the Constitution of South Africa imposes a default obligation on the Executive to consult the public when negotiating and signing treaties, and the question is deliberately left open.

The South African Litigation Centre argument:

[51] The arguments raised were as follows:-

The application of regional and international law to the establishment of an individual's right of access to the SADC Tribunal;

The interpretation of s. 34 of the ***Constitution*** within an international and regional context.

In general, the submission was that South Africa's parliamentary ratification of the SADC Treaty and First Protocol created the right of individuals to access a regional tribunal. The 2014 Protocol hinders this access. The First Amicus Curiae therefore supported the relief sought by the Applicants.

The Respondents' defence:

[52] In the Answering Affidavits (deposed to by Government officials, but confirmed by the First Respondent), the deponents say that the relevant challenge to the President's signature of the 2014 Protocol is premature, and did not bind South Africa, which would require the Protocol to be placed before Parliament for approval, and no decision had been taken to do that. It was also said that the decision was neither unlawful, irrational nor taken in bad faith.

[53] As far as the defence of prematurity was concerned, it was said that the 2014 Protocol expressly provides that it will only come into force if, and when, it has been ratified, in accordance with each State's own constitutional provisions, by 10 Member States out of the 15 Member States of SADC. When that happens, it will only bind those States that have ratified it. The President's signature did not bind South Africa to the Protocol as envisaged by the provisions of s. 231 of the ***Constitution***, nor did it bring the Protocol into effect. Thus, the President's signature could not be said to have affected any rights or interests of any parties, including those of the Tembani Applicants.

It is further submitted that the Government was still considering whether or not to place the Protocol before Parliament to seek its approval. However, the President, in consultation with the Cabinet and other Government Respondents, was awaiting the outcome of this case before taking a final decision, whether or not to table the Protocol before Parliament.

Factually, the SADC Tribunal has been suspended in terms of a decision taken by the SADC Summit in May 2011.

[54] It was submitted that the President's decision was not irrational and in line with the provisions of s. 231 (1) of the ***Constitution***, the exercise was one of executive competence in relation to foreign affairs, in respect of which the Executive has a broad discretion as to what should be taken into account. It was contended that the President took into account that the SADC Summit had since 2012 approved the negotiation of a Protocol that would change the nature of the SADC Tribunal to receive only State complaints. The President's decision to sign the Protocol was therefore based on the recognition that the negotiations for the Protocol had been concluded, and out of comity and mutual respect for SADC in the Member States of SADC, the Protocol represented the collective, multi-lateral, negotiations of the SADC Member States.

[55] The decision of the President recognized, so it was contended, that the signature of the Protocol was only preliminary and formal in nature, it did not, and was not intended to bind South Africa. The President's signature was therefore intended to demonstrate that South Africa was open to considering the ratification of

a Protocol that represented the outcome of the collective, multi-lateral negotiations of the SADC Member States. The signature was therefore rationally related to the purpose of conducting South Africa's foreign affairs in that the Protocol was adopted by SADC and was in line with a prior determination made by the SADC Summit. It was therefore "simply a formal, preliminary step".

[56] Expanding on these topics, it was argued by Mr G. Marcus SC, appearing for the respondents, that the nature of the decision-making process of the First Respondent, would determine the ambit of the review before us. It was a consensus decision taken in accordance with the provisions of art. 10 of the Treaty. Consensus was a product of compromise amongst States who were all on equal footing, but had diverse legal systems, and diverse economic systems. International relations lay at the heartland of the Executive, and this fact would constrain any judicial review. Mr Marcus specifically conceded that he was not submitting or proposing that the signature of the President was without legal significance, but emphasized that it was only the first step in a process that would lead to ratification by Parliament after

public participation, and finally after the document of ratification had been filed with the Secretariat of SADC. He agreed that the signing would trigger the relevant parliamentary process.

He also referred to the provisions of s. 35 of the Treaty which provided for the dissolution of SADC and any of its institutions. Obviously this had not occurred, but individual rights were indeed removed, as in future the SADC Tribunal would only have jurisdiction to deal with disputes between States, and not between individuals and States.

[57] The 2014 Protocol had not been ratified by any Member State as yet, and because the envisaged parliamentary process was unknown and unpredictable, the application at this stage was premature, ran the argument. As far as the argument based on irrationality of the First Respondent's conduct was concerned, it was argued that it was a fallacy to presume that the only rational model was one which provided for the Tribunal's jurisdiction between individuals and Member States. There was no such one rational model. He agreed that if the Treaty itself had been

breached, that would be the end of the matter, and the Applicants would have to succeed. Before this Court could make any order, it had to identify the breach of an obligation by the First Respondent. The Protocol of 2000 indeed provided for jurisdiction that would involve individual complaints against Member States, whilst the Protocol of 2014, envisaged taking away such jurisdiction.

[58] As far as the suspension of the 2000 Protocol was concerned, he argued that an unacceptable delay had occurred by the First Applicant only filing its Notice of Motion during March 2015. This delay had not been properly explained. The explanation for the delay did also not cover the entire period.

The Applicants' reply:

[59] Mr Gauntlett SC on behalf of the Tembani Applicants emphasized the fact that Mr Marcus SC had conceded that the President's signature was not without legal significance. It was his submission that the only need to hold that such was a necessary step to put the parliamentary process into operation. With reference to the

dictum of the Constitutional Court, par. 2 of the ***Fick*** decision ***supra***, he emphasized that context was important: it was the duty of the First Respondent to foster and embrace the notion of human rights, and that went to the heart of the matter. (See s. 7 (2) of the ***Bill of Rights*** which states that the State must respect, protect, promote and fulfil the rights in the ***Bill of Rights***).

[60] Mr Ngcukaitobi, replying on behalf of the First Applicant emphasized that the relevant executive act was the trigger point that would set the parliamentary process in action, and as such it had to satisfy the standard of legality. Unless this decision was taken subsequent acts could not be taken and these would be covered with a veneer of legality. The 2011 decision should also not be seen in isolation. It was part of a continuum and it was certainly connected to the 2014 decision. That decision had nothing to do with an argument based on art. 35 of the Treaty dealing with dissolution. It merely decided not to renew the terms of office of Judges and also not to reappoint them. This was an illegal act. The President should not have participated in such illegality. As far as the delay was concerned, he pointed to the

fact that the Summit itself had asked for an expert opinion, and also for a memorandum by the Council of Ministers before dealing with the import and consequences of the Zimbabwe *Fick* decision. The Applicants therefore had to wait for such an outcome and in the interim had also approached the African Commission. Furthermore, there was no prejudice to anyone inasmuch as no factual issues were involved. His submission was simply that the President had participated in an illegality in conflict with the terms of the Treaty which had been made binding by the South African Parliament. In his view, we could dispose of the case on the narrow basis of illegality.

Discussion and findings:

[61] The background to the establishment of SADC and the Tribunal has been set out in some detail in the judgment of *Fick supra*. Paragraph 6 of that judgment specifically refers to the establishment of a human rights culture and the purpose of the Tribunal. The Treaty in its Preamble, states that the Heads of State of the various States are "mindful of the need to involve the people of the region centrally

in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the Rule of Law". SADC, according to art. 3 is an international organisation. Article 4 refers to its principles and states that the Member States shall act in accordance with principles including those of "human rights, democracy and the Rule of Law". Article 6 provides for an undertaking that Member States shall take all necessary steps to accord this Treaty the force of national law. Article 9 establishes the Tribunal. Article 10 provides that the Summit shall consist of the Heads of State of Member States shall be responsible for the overall policy direction and control of the functions of SADC. The Tribunal was established by way of art. 16 which also provide that its position, powers and functions shall be prescribed in Protocol, which shall, notwithstanding the provisions of art. 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit. Article 22 in turn, deals with Protocols to be concluded and the ratification of such by Member States. Article 16 also provides that the decisions of the Tribunal shall be final and binding.

[62] The actual decision of the Summit in August 2010, May 2011 and August 2012, have already been referred to above.

It is clear that these not only removed the rights of persons to lodge disputes against States, but in effect "suspended" the activities of the Tribunal by imposing a "moratorium" on its activities. How these decisions could ever rationally contribute to the purpose of the Treaty and the First Protocol, was never explained by anyone.

The legality argument:

The violation of the SADC Treaty itself:

[63] We have referred to the relevant articles of the Treaty and especially art. 9 (1) (g), which establishes the SADC Tribunal as an integral organ of SADC. We have referred to the founding principles relating to "human rights, democracy and the Rule of Law", and the obligation of Member States to act in accordance with them as per art. 4 (c). It is clear that Member States are also precluded from "taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty". (Article 6 (1)).

[64] On behalf of the Tembani Applicants, Mr Gauntlett SC correctly submitted, in our view, that any act which detracted from the SADC's Tribunal's exercise of its human rights jurisdiction, at the instance of individuals, was inconsistent with the SADC Treaty itself, and violated the Rule of Law. The President's signature of the 2014 Protocol was such an act. Any Protocol to the SADC Treaty is a subordinate legal instrument and it is not permissible to emasculate a SADC organ established by the SADC Treaty itself, in this manner. The SADC Treaty itself was not amended and the desired result was illegally contrived through an attempt to repeal and replace the 2000 Protocol on the Tribunal by the 2014 Protocol. According to the President's Answering Affidavit, his signature "was intended to demonstrate that South Africa was open to considering the ratification of a Protocol", which terminated the human rights jurisdiction which the Tribunal conclusively held the SADC Treaty vested in it. Thus, at the very least, on the First Respondent's own papers, the signature signalled South Africa's participation in a conspiracy initiated by the President Mugabe-regime in Zimbabwe to undermine an essential SADC institution's

ability to enforce a fundamental SADC objective: compliance with the Rule of Law and human rights. This topic is wholly dealt with by Cowell (2013) ***"The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction" 13 (1) Human Rights Law Review 153 at 164.***

[65] We are persuaded by Mr Gauntlett SC when he submitted that the Tembanis' first cause of action had been clearly established even on the First Respondent's own papers, which did not even attempt to refute the founding papers on this issue. It was also contended in addition that the retrospective interference with vested rights aspect was not even dealt with in the Respondents' Affidavits. The Tembani Applicants had vested interests in SADC Tribunal awards and the enforcement of these awards was specifically provided for in the Treaty itself and the 2000 Protocol. All these vested rights had been interfered with retrospectively with the participation of the First Respondent.

[66] On behalf of the First Applicant, Mr Ntsebeza SC, and with him Mr Ngcukaitobi, had contended that the First Respondent's actions relating to the 2011 suspension and the 2014 Protocol were in clear conflict with the terms of the Treaty itself, the terms of the First Protocol and the provisions of s. 231 (4) and (5) of the ***Constitution of South Africa***. The actions were taken without approval of Parliament. The *Amici* had also intended that the provisions of s. 7 (2) of the ***Bill of Rights*** were applicable as well. These submissions are cogent.

[67] It is clear that conduct in conflict with provisions of the ***Constitution*** is self-evidently unconstitutional as well as illegal and is liable to be set aside by a Court. The principle of legality underlies our constitutional dispensation and no power can be lawfully exercised unless permitted.

See: ***Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC)***. The Rule of Law is supreme.

We are therefore of the view that the First Respondent's signature to the 2014 Protocol was unlawful in the sense of being unconstitutional and is therefore liable to

be set aside. Much of the same reasoning applies to the First Respondent's participation in suspending the SADC Tribunal. The Tribunal and its jurisdiction lie at the heart of the SADC Treaty and fulfil one of its main purposes. Its emasculation by way of its de facto suspension was therefore similarly in conflict with the Founding Treaty and South Africa's constitutional obligations.

Irrationality and arbitrariness:

[68] It is clear from numerous decisions of the Constitutional Court, as well as this Court, in the context of the present facts, that if the President's signature to the 2014 Protocol cannot rationally be related to a legitimate Government purpose authorized by s. 231 (1) of the ***Constitution*** and the SADC Treaty, the President acted irrationally.

See: ***Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC) at par.*** 51, and ***Pharmaceutical Manufacturers Association of South Africa: In re: Ex parte President of the Republic of South Africa 2000 (2) SA 674***

(CC) at par. 85, and ***Democratic Alliance v Minister of International Relations and Cooperation*** *supra at par. 64.*

As has been pointed out, in the ***Fick*** decision *supra*, the Constitutional Court held that our ***Constitution*** promotes democracy, human rights and the Rule of Law. The SADC Treaty similarly entrenches these principles, and also imposes an obligation on Member States to promote them. It is true, with reference to the detailed argument on behalf of the Tembani-Applicants that we have referred to, that the President's signature cannot be connected to the promotion of any of these principles. In none of the Answering Affidavits filed on behalf of the President, have any of these principles been invoked. Neither has it been suggested that signing the 2014 Protocol, could conceivably be connected to any of these principles.

[69] Having regard to the facts, it is clear that the irrationality of the signature is self-evident. Instead of supporting the Tribunal, as the Treaty envisages, and at the instance of the violator of the Tribunal's orders (the Zimbabwe Government), the Tribunal's jurisdiction was simply signed away, contrary to the advice of the

Ministers of Justice and Attorneys-General, contrary to the recommendation of the independent expert appointed to conduct a review on the Tribunal, without consultation and approval of the South African Parliament, in ignorance of the fact that the Treaty and the First Protocol had become part of our domestic law, without consulting any of the affected persons whose complaints had been upheld by the Tribunal, and where no alternative had been provided to such litigants who had obtained vested rights before the Tribunal. The Zimbabwe ***Fick*** judgment and its import were ignored, as was the Constitutional Court's judgment in the ***Fick*** decision. None of these material issues were dealt with in the Respondents' Answering Affidavits, and there is no explanation why the Protocol was signed by the President if, as is now contended, it was not intended to bind South Africa.

[70] Section 84 (2) (h) and (i) of the ***Constitution*** confer on the President the responsibility for diplomatic recognition, comity, respect or graces. Furthering diplomatic relations, is not a constitutionally-authorized purpose to be fulfilled through signing treaties under s. 231 (1) of the ***Constitution***. As a matter of logic it

is also so that if, as now contended, the signature is insignificant, then in any event there was no rationale for executing it. If it is purposeless, no purpose is served by the act of signing the Protocol. If it was done for "respect" on the process of terminating SADC's Tribunal's individual jurisdiction, then it was certainly unauthorized by s. 231 (1) of the ***Constitution***, and thus contrary to the Rule of Law, for being irrational, unauthorized and repugnant to the Rule of Law in the context of access to justice.

[71] In any event, it is clear that the President's signature could not "ensure respect for an institution" as the Respondents would have it. In fact, it severely undermined the crucial SADC institution, the Tribunal. It detracted from SADC's own stature and institutional accountability and violated the SADC Treaty itself, as we have pointed out. Such conduct is plainly inconsistent with the Constitutional Court's recognition in ***Fick supra***, of the objectives of SADC, and it is abundantly clear that this judgment was not even considered by the Respondents.

As we have pointed out, South Africa remains bound by the Treaty and the First Protocol. Amending the Treaty and without terminating the First Protocol, the Executive has no authority to participate in a decision in conflict with South Africa's binding obligations. If it was the intention to withdraw from South Africa's obligations under both the Treaty and the Protocol, consent of Parliament had to be obtained first. Failure to do so, in the present context, is unlawful and furthermore irrational.

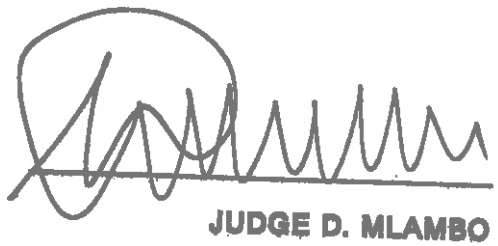
[72] As a result, the Applicants' argument relating to the rationality of the President's conduct must be upheld. There is no reason not to grant the order sought by the Law Society in terms of prayer 1 of its Notice of Motion.

The following orders are therefore made:

1. **It is declared that the First Respondent's participation in suspending the SADC Tribunal and his subsequent signing of the 2014 Protocol on the SADC Tribunal is declared unlawful, irrational and thus, unconstitutional;**

2. The Applicants as well as the First and Second Amicus Curiae, are entitled to the costs of the application, including the costs of two Counsel, which includes the costs pertaining to the intervention application;

3. In terms of the provisions of section 172 (2) (a) of the Constitution of the Republic of South Africa, this order is referred to the Constitutional Court for confirmation.



JUDGE D. MLAMBO
JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE HIGH COURT

I AGREE

JUDGE N. MNGQIBISA-THUSI
JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT

Case number: 20382/15

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Date of Hearing: 5 February 2018

Date of Judgment: 1 March 2018 at 10:00