IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 67/18

In the matter between:

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

and

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

SOUTHERN AFRICA LITIGATION CENTRE'S WRITTEN SUBMISSIONS

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INTRODUCTION

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

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

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

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

OVERVIEW

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

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

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

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

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

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

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

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

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

13. The structure of these submissions is as follows:

    12.1. First, a brief history of the Tribunal.

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

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

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

    12.5. Finally, closing submissions and concluding remarks.

THE SADC TRIBUNAL: A BRIEF HISTORY

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

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

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

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

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

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

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

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

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

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

THE PRESIDENT'S CONDUCT IS UNLAWFUL, IRRATIONAL AND UNCONSTITUTIONAL

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

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

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

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

Procedural Failure

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Unlawful Procedures Used by the SADC Summit

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

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

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

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

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

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

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

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8 Record Vol 5 pp 421 – 489.

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

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

11 Record Vol 6 p 559 at par 18.

12 See, for example, articles 6(1), 9, 16(1) of the Treaty.

> *"South Africa has essentially bound itself to do whatever is legally permissible to deal with any attempt by any Member State to undermine and subvert the authority of the Tribunal and its decisions as well as obligations under the Amended Treaty."*[13]

36. The above exposition reiterates the high standard that South Africa has to adhere to under the Treaty, as amended by the 2000 Protocol. It cannot subvert the authority of the Tribunal. Much as Member States have the freedom to amend the Protocol or the Treaty in general, this can only be done in accordance with the terms of the Treaty.

37. The State has argued that since the 2014 Protocol has not yet entered into force, the President's action has no consequential effect to the rights of the citizens of South Africa. SALC submits that this does not absolve the President of wrongdoing as his actions remain unlawful in totality.

38. This is because neither the 2000 Protocol nor the Treaty have been amended and the Tribunal has not been dissolved; it still remains law, as such, the President is under an obligation to comply with its provisions, including the procedure for its amendment or dissolution. This cannot be done by the Summit adopting a new Protocol to dissolve the Tribunal as they did in 2014.

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[13] *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 59.

The law

39. As has been confirmed many times by South African courts, the exercise of all public power, including discretionary executive action taken by the President, is constrained by the limits of the Constitution.[14]

40. It is an unexpressed or implied provision in the Constitution that the State operates through three separate branches: the executive; the legislature; and the judiciary.[15]

41. Within our constitutional conception of the separation of powers exists a system of checks and balances. Checks and balances ensure that the various arms of government control and counter each other's conduct to ensure accountability and that public power is exercised within constitutional bounds.[16] It is the role of our courts to make certain that all branches of government are acting within the limits of the Constitution.[17]

42. The President's actions in relation to the suspension of the Tribunal and signing of the 2014 Protocol are exercises of public power (as

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[14] See *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) paras 49-50; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) paras 17-20, 85; *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 78; *Mansigh v General Council of the Bar* 2014 (2) SA 26 (CC) para 16; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 38.

[15] *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) paras 19-22.

[16] *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) para 133.

[17] Courts are required by the Constitution "*to ensure that all branches of government act within the law' and fulfil their constitutional obligations*". *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 38.

executive actions) and implicate important rights protected under the Bill of Rights. They are, therefore, subject to Constitutional limits.

43. Section 7(2) of the Constitution imposes a positive obligation on the state to uphold the Bill of Rights. Section 8(1) of the Constitution explicitly binds every organ of the State, including the executive, to uphold the Bill of Rights.

44. The Constitutional Court has described the interaction between sections 8(1) and 7(2) in relation to the President as follows:

> *"And since in terms of section 8(1), the Bill of Rights "binds the legislature, the executive, the judiciary and all organs of state", it follows that the executive, when exercising the powers granted to it under the Constitution, including the power to prepare and initiate legislation, and in some circumstances Parliament, when enacting legislation, must give effect to the obligations section 7(2) imposes on the state.*"[18]

45. The executive has the prerogative to decide how to implement its obligation to take positive measures in respect of fundamental rights, provided these measures "*fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt*".[19]

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[18] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 190.

[19] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 191.

46. Executive decisions are also subject to the principle of legality, located in section 1(c) of the Constitution.[20] Section 1(c) entrenches constitutional supremacy and the rule of law as foundational values upon which our State is founded. This Court has expressed this as:

> *"[T]he 'executive' is 'constrained by the principle that [it] may exercise no power and perform no function beyond that conferred… by law' and that the power must not be misconstrued.*"

47. Taking these Constitutional limits into account, courts have stated that, at *a minimum*, executive action must meet the requirement of rationality:

> *"It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement.*"[21]

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20 *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) para 124.

21 *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 85. See also *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) paras 30-2.

48. Even when the President is exercising completely discretionary powers under the Constitution,[22] his actions must be: "*rationally related to the purpose for which the power was given*"[23] or, put differently, "*rationally related to the objective sought to be achieved*" (the rationality test).[24] This is an objective test.[25]

49. Procedural irrationality is also part of the inquiry for a discretionary executive action. The test for procedural rationality was explained by this Court in *Democratic Alliance*:

> *"[T]he decision of the President as Head of the National Executive can be successfully challenged only if a step in the process bears no rational relation to the purpose for which the power is conferred and the absence of this connection colours the process as a whole and hence the ultimate decision with irrationality. We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.*"[26]

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22 This Court has held that this test applies to decisions taken by the President in the role as both the head of the National Executive and the head of State. See *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) para 35.

23 *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 85.

24 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 51.

25 *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) paras 32-4; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 51; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 86.

26 *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) para 37.

50. This specific test for procedural rationality was used by the High Court to evaluate the procedural rationality of the President's action in the context of international treaties in *Democratic Alliance v Minister of International Relations and Cooperation*.[27] Even in an area where the executive has great power, such as international relations and international treaties, procedural impropriety has been a basis of finding executive action unlawful.

51. Finally, the President is also required to act in good faith in executive decision-making.[28]

Analysis

52. When these principles are applied to the President's conduct, it is clear that the President acted unlawfully. First, the President's procedural error is extensive, irrational and in bad faith. The President participated in several different actions that directly contradict the text of the Treaty:

    52.1. issuing a decision to stop the referral of cases to the Tribunal;

    52.2. non-renewal of sitting judges;

    52.3. not nominating new judges; and

    52.4. commissioning a review of the Tribunal and acting against the Tribunal's expert's recommendation.[29]

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[27] *Democratic Alliance v Minister of International Relations and Cooperation (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP) para 64.

[28] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 148; *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 80.

[29] Record Vol 5 pp 447 – 448 states that:

53. Despite the Constitution empowering and enjoining the President to take positive measures in respect of fundamental rights, the President agreed with the Summit to avoid and did avoid following the proper procedure to amend the Treaty. In doing so, when the President acted in terms of section 231 of the Constitution, he did so both *ultra vires* the Treaty (by acting outside of the prescribed amendment procedure) and irrationally, and thus unconstitutionally. This obligation is not only located in section 231, but comprises a general constitutional obligation articulated by this Court as follows:

> *"South Africa has essentially bound itself to do whatever is legally permissible to deal with any attempt by any Member State to undermine and subvert the authority of the Tribunal and its decisions as well as the obligations under the Amended Treaty. Added to this, are our own constitutional obligations to honour our international agreements and give practical expression to them, particularly when the rights provided for in those agreements, such as the Amended Treaty, similar to those provided for in our Bill of Rights, are sought to be vindicated. We are also enjoined by our Constitution to develop the common law in line with the spirit, purport and objects of the Bill of Rights."*[30]

"*At present, individuals may bring cases against Member States. The view was expressed by one Member State at the Senior Officials meeting that this is inappropriate, and it is also worth noting that such a jurisdiction is not always found in legal systems similar to the SADC legal system. …In the absence of…an individual right of access to the SADC Tribunal would leave individuals with no recourse against their Member States beyond national courts. Should national remedies be insufficient, individuals would be left without effective protection. In view of this, no recommendations are made in this report to change the status quo.*" (Emphasis added).

30 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 59.

54. When promulgating the 2014 Protocol, there was no rational basis to bypass article 36 in favour of article 22 procedures. In fact, sticking to the Treaty's amendment procedure would have alleviated the Summit's stated concerns related to the Tribunal's individual jurisdiction[31] without an extensive signature and ratification process.

55. The Tribunal could have been immediately reformed by agreement by three-quarters of the Members of the Summit. Instead, the President chose not to adopt this prescribed process, but rather stepped outside the authority granted to him under the Treaty's amendment scheme and acted in concert with the Summit.

56. The Summit's decisions in which the President took part also violated substantive SADC law specified in the 2000 Protocol that mandated the Tribunal to exist, enabled it to take cases, and to be staffed with judges. While the Summit is the main policy director of SADC, the Treaty does not permit the heads of state that comprise the Summit to violate the mandates of the Treaty or dismantle a vital organ of the Treaty. If the Summit wished to take such action it could and should have proposed an amendment to the Treaty, but this step was never taken.

57. It stands to reason that the article 22 procedure was used for the 2014 Protocol precisely because it requires fewer states to support the decision. The 2014 Protocol was signed by only nine (9) heads of

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31 See for example, Record Vol 6 p 558 at par 18 with reference to Annexure JS2 of the affidavit: Record of Meeting of the SADC Summit for Heads of State and Government (17-18 August 2012) (Annexure JS2 was not included in the record before this Court).

State,[32] below the ten (10) needed under article 22, and far from the twelve (12) required for the proper article 36 procedure. It is more likely that article 22 ratification – ostensibly the process to amend protocols – allows the SADC states to avoid reconstituting the Tribunal indefinitely. This is a further sign that the decision to participate in the article 22 process was taken in bad faith and is consistent with the repeated procedural and substantive actions taken by the President individually and collectively within the Summit to fetter the Tribunal.

58. The President, as a member of the Summit, was empowered to amend the Treaty. This power and the procedure to be followed when exercising it are set out in articles 36 and 37 of the Treaty. The President did not follow this procedure. Rather, he joined the Summit in arbitrarily and irrationally bypassing this procedure. In doing so, he violated the rule of law and principle of legality by circumventing the explicit instructions of the binding Treaty approved by Parliament.

59. However, this was not the only illegality that arose as a result of the President's conduct. The President's conduct amounted to an unjustifiable infringement of the fundamental right of South African citizens of access to justice that is expressly protected in the Bill of Rights.

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[32] Record Vol 6 p 564 at para 34.

Unjustifiable Infringement of the Fundamental Right to Access the Tribunal

60. The established approach to determining whether a fundamental right has been unjustifiably limited was described by this Court in *Ferreira* as a two-stage process, with the first entailing "*an enquiry into whether there has been an infringement of the … guaranteed right*" and that "*it is for the applicants to prove the facts upon which they rely for the claim of infringement of the particular right in question*".[33]

61. The *onus* first lies with the party alleging the violation, who must demonstrate that a right has been infringed. That party must show that the conduct falls within the ambit of the particular constitutional right and must *prima facie* prove that the conduct impedes or limits that right.

62. Accordingly, we address this section in three parts:

    62.1. First, we address the substantive content of the right in section 34 of the Constitution and submit that it includes the right of South African citizens to access an international court in the form of the SADC Tribunal.

    62.2. Second, we demonstrate why the President's conduct, in participating in the 2011 Suspension and, later, the 2014 Protocol infringed the right in section 34 of the Constitution.

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[33] *Ferreira v Levin NO* 1996 (1) SA (CC) para 44.

62.3. Third, we explain why the President's conduct, in infringing the right in section 34 of the Constitution, is incapable of being justified in terms of section 36 of the Constitution in that the President's conduct does not amount to a "*law of general application*".

The right

63. In *Fick*, this Court explicitly found that SADC Treaty gives rise to constitutional obligations:

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

64. Under the Constitution, the state is obligated to give "*practical expression*" to international agreements binding on South Africa.[35] This obligation to give practical expression of international obligations stems from several provisions of the Constitution including articles 7(2) and 8(1).[36]

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34 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 69.

35 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 59.

36 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) paras 189-190.

65. This Court has noted that the obligation to give practical expression to international agreements is heightened when those international agreements are seeking to vindicate rights protected in the Bill of Rights.[37] This Court specifically recognised, in *Fick,* that the SADC Treaty was such a treaty.[38]

66. As set out in *Fick*, the version of the Treaty that currently binds South Africa is that version that incorporates the 2000 Protocol "*as a part of the original Treaty*".[39] The Tribunal was a fully functioning court that provided access to justice in the SADC region by adjudicating disputes between member states and between individuals and member states. Accordingly, the Tribunal permitted South African citizens to approach the Tribunal to resolve disputes arising from human rights violations. Not only does this provide South Africans access to an impartial forum as protected under section 34 of the Constitution, but accessing this forum allows them to vindicate and protect other rights.

67. Further, section 39(1)(b) of the Constitution requires that when interpreting the Bill of Rights, a court must take international law into account. In fact, the measure of the State's reasonableness in protecting the rights articulated in the Constitution is international law:

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

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37 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 59.

38 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 59.

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

> *Republic in international law, and makes them the measure of the State's conduct in fulfilling its obligations in relation to the Bill of Rights."*[40]

68. Using this reasoning, this Court in *Glenister II* held that because corruption implicated numerous rights protected in the Bill of Rights, there was a constitutional obligation to establish an independent, anti-corruption unit.[41] This duty must be interpreted in line with South Africa's international obligations, which were also a source of responsibility.[42] In discussing the international agreements, the Court stated:

> *"The obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere.*"[43]

69. In fact, one of the international agreements that this Court relied on in *Glenister II* was a SADC Protocol signed and ratified by South Africa: the SADC Protocol against Corruption.[44]

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40 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 178.

41 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) paras 175-7.

42 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) paras 192-193.

43 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 189.

44 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 169.

70. There are in fact a number of SADC Protocols that were signed and ratified by South Africa which impose similar obligations on the country and explicitly grant access to the Tribunal.

70.1. One such Protocol is the Protocol on Gender and Development.[45] Article 36 of the Protocol provides that "*[a]ny dispute arising from the application, interpretation or implementation of this Protocol, which cannot be settled amicably, shall be referred to the SADC Tribunal, in accordance with Article 16 of the Treaty*".

70.2. A second is the Protocol on Finance and Investment which explicitly grants access to individuals to access justice at the Tribunal.[46] Annex 1 to the Protocol provides for dispute resolution between individual investors and State Parties which includes: "*Where the dispute is referred to international arbitration, the investor and the State Party concerned in the dispute may agree to refer the dispute either to: (a) The SADC Tribunal*".[47]

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45 South Africa ratified the protocol on October 29, 2012 and it entered into force on February 22, 2013. "Protocol on Gender and Development" *Department of International Relations and Cooperation South African Treaty Register.* The Protocol entered into force on 22 February 2013. On 15 April 2009 Cabinet approved the Protocol on Gender and Development for submission to Parliament. Minutes of the Cabinet meeting are available online at https://pmg. org. za/briefing/18695/ (last accessed on 28 July 2018). The Portfolio Committee on Women, Children, Youth and People with Disabilities, considered the SADC Protocol on Gender and Development and on 24 August 2011 recommended that the National Assembly in terms of section 231(2) of the Constitution approve the Protocol. Minutes of the Portfolio Committee meeting are available online at https://pmg. org. za/tabled-committee-report/644/ (last accessed on 28 July 2018). The Protocol was considered and ratified by the National Assembly on 30 August 2011. Minutes of the National Assembly debate are available at https://pmg. org. za/hansard/18177/ (last accessed on 28 July 2018).

46 South Africa ratified the Protocol on June 19, 2008 and it entered into force on April 16, 2010. "Protocol on Finance and Investment" *Department of International Relations and Cooperation South African Treaty Register*.

47 Protocol on Finance and Investment, Annex 1, art. 28.

71. In ratifying these respective Protocols, Parliament's legislative intent is to ensure that the Tribunal is available for the resolution of disputes between not only Member States, but that individuals are also allowed to access the Tribunal. As we will show, the actions of the President of depriving citizens of this right have created absurd results. Without the existence of the Tribunal, *Parliament-approved laws* cannot be applied to give effect to their original intent.

72. Parliament's ratification of international agreements under section 231(2) of the Constitution confers South African citizens with rights on a domestic level.

73. Following the logic of *Glenister II* and *Fick* that international obligations are the measure of interpreting how the State protects and fulfils the Bill of Rights, a right to access justice under section 34 of the Constitution should, accordingly, be interpreted as including individuals' access to the SADC Tribunal. There is a binding legal obligation that extends the right of access to justice to the SADC Tribunal for citizens of South Africa.

<u>International and Regional Law Practice</u>

74. This interpretation is consistent with the predominant international practice regarding access to regional or international tribunals. As a starting point, it should be noted that a bulk of the decisions handed down by the SADC Tribunal before 2010 were initiated by private actors. Of the Tribunal's nineteen (19) judgments, five (5) of the matters were instituted by SADC employees, only one (1) by a state party, and the remaining thirteen (13) were instituted by private

actors.[48] This is an indication of how the Tribunal's primary function to date has been to address the individual concerns of SADC citizens.

75. In *Mike Campbell v Zimbabwe*,[49] the Tribunal decided that it had jurisdiction to hear human rights cases based on Articles 4(c) and 6(1) of the Treaty. Article 4(c) requires States to respect the principles of human rights and rules of law. Article 6(1) requires States to refrain from taking any measures likely to jeopardise the sustenance of the principles of the SADC Treaty; and the achievement and implementation of its objectives. The effect was that the Tribunal, before its suspension, provided an additional layer of protection through its jurisprudence on human rights.

76. The East African Court of Justice;[50] the Common Market for Eastern and Southern Africa's (COMESA) Court of Justice;[51] the ECOWAS

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48 E de Wet "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" (2013) 28 *ICSID Review* 45, 48.

49 Case No. SADC (T) 2/2007 available at http://www.saflii.org/sa/cases/SADCT/2008/2.html (last accessed on 28 July 2018).

50 Article 30 of that treaty provides:

"*1. Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty*."

51 Under Article 26 of the COMESA Treaty any legal or natural person resident in a member state may refer for determination the legality of any act, regulation, directive or decision of the Council or of a member state on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of the COMESA Treaty, subject to the exhaustion of local remedies.

Court;[52] the African Commission on Human and Peoples' Rights;[53] the European Court of Human Rights;[54] the European Court of Justice;[55] and the Inter-American Commission on Human Rights[56] all allow individual persons to approach the international tribunal.

77. The reason so many of these regional and international systems have made provisions for individual access to international tribunals is that they complement domestic courts in the enforcement of international human rights obligations. Without these international tribunals, the various regional mechanisms protecting human rights simply would not work as states failing to comply with their international obligations could continue to operate with impunity.

78. In the case of *Malawi Mobile Mobile Ltd. v the Republic of Malawi,*[57] the COMESA Court took the view that access to the international

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52 The Supplementary Protocol Amending the Protocol relating to the Community Court of Justice (2005) clearly outlined and increased the jurisdiction of the court and improved its access provisions. According to Article 4(c) of the Supplementary Protocol:

"*(c) Access to the Court is open to the following: Individuals and corporate bodies in proceedings from the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies."*

53 Article 55 of the African Charter on Human and Peoples' Rights.

54 Article 34 of the European Convention.

55 The parties that have access to the ECJ are EU states, the EU Commission, other EU institutions, employees of EU institutions as well as private individuals, companies and other organisations. Art 263 of the Treaty on the Functioning of the European Union, available at http://eur-lex. europa. eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT (last accessed on 28 July 2018). European citizens may also bring an action for damages before the General Court against the EU Community or an EU state which infringes an EU Community rule. Art 268 of Treaty on the Functioning of the European Union. Other actions that may be taken to the ECJ include appeals from the General Court against decisions of the EU Civil Service Tribunal, and actions for failure of EU institutions to act. Art 265 of Treaty on the Functioning of the European Union.

56 Article 44 of Inter-American Convention on Human Rights.

57 *Malawi Mobile Mobile Ltd. v the Republic of Malawi* (Ruling) no. 1 of 2015 (2015) available at http://comesacourt. org/wp-content/uploads/2017/04/Ruling-Malawi-Mobile-Limited-Vs-Government-of-the-Republic-of-Malawi-Malawi-communication-Regulatory-Authority-reference-No. -1-of-2015-Part-2. pdf (last accessed on 28 July 2018).

tribunal established by treaty was an issue of access to justice. It stated as follows:

> *"If such claims come within the ambits of Article 19 and 23 of the Treaty, this Court will have jurisdiction to entertain such matters. The drafter of the Treaty and the Member States must have intended to improve residents' access to justice when they enacted the Treaty in the format that it is in and in so doing granting all persons (both natural and legal persons) the right to file a Reference before the COMESA Court of Justice."*[58]

79. The Court reasoned that it was not limited to hearing disputes related to acts, directives, decisions or regulations of the Organs established by the Treaty, but instead it had jurisdiction over acts of Member States.[59] To do otherwise would be contrary to the fundamental principles and goals of the Treaty including "*economic justice and popular participation of development; the recognition and observance of the rule of law; and the promotion and sustenance of a democratic system of governance in each Member State*".[60] In this way, the existence of and access to an international tribunal promotes the rule of law, access to courts, and justice.

80. In the Separate Opinion of Judge A. A. Cançado Trindade in the Inter-American Case *Pueblo Bello Massacre v Colombia,*[61] the judge

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58 *Malawi Mobile Mobile Ltd. v the Republic of Malawi* para 81.

59 *Malawi Mobile Mobile Ltd. v the Republic of Malawi* paras 42-4.

60 *Malawi Mobile Mobile Ltd. v the Republic of Malawi* paras 42-4.

61 (Judgment (Merits, Reparations, and Costs)) Amer. Ct. of H. R. (25 November 2006).

remarked on the incredibly broad right of access to justice under international law:

> *"This right is not reduced to formal access, stricto sensu, to the judicial instance (both* ***domestic and international****), but also includes the right to a fair trial and underlies interrelated provisions of the American Convention (such as Articles 25 and 8), in addition to permeating the domestic law of the States Parties. The right of access to justice, with its own juridical content, means, lato sensu, the right to obtain justice. In brief, it becomes the right that justice should be done. … One of the main components of this right is precisely direct access to a competent court, by means of an effective, prompt recourse, and the right to be heard promptly by this independent, impartial court, at* ***both the national and international*** *levels (Articles 25 and 8 of the American Convention). As I indicated in a recent publication, here we can visualize a true right to law; that is, the right to a national and international legal system that effectively safeguards the fundamental rights of the individual."*[62] (bolded emphasis added)

81. In its jurisprudence, the East African Court of Justice has also affirmed the importance of individual access to regional courts and its necessity for the safeguarding of human rights. In *Honorable Sitenda Sebalu v Secretary General of the EAC*, it stated:

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62 *Pueblo Bello Massacre v Colombia* (Separate Opinion of Judge A. A. Cançado Trindade) Amer. Ct. of H. R. (25 November 2006) para 61.

> *"This Court wishes to draw attention to Article 6(d) of the East African Community Treaty which urges the Partner States, inter alia, to recognize, promote and protect human and people's rights in accordance with the provisions of the African Charter on Human and People's Rights. National courts have the primary obligation to promote and protect human rights. But supposing human rights abuses are perpetrated on citizens and the State in question shows reluctance, unwillingness or inability to redress the abuse, wouldn't regional integration be threatened? We think it would. Wouldn't the wider interests of justice, therefore, demand that a window be created for aggrieved citizens in the Community Partner State concerned to access their own regional court, to wit, the EACJ, for redress? We think they would."*[63]

82. The right of access to courts, domestically—as recognised by the Constitutional Court in many cases including in *Fick,*[64] and internationally,[65] encompasses the right to an effective remedy. In

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63 *Honorable Sitenda Sebalu v Secretary General of the EAC, Attorney General of the Republic of Uganda, Honorable Sam K. Njuba and the Electoral Commission of Uganda*, REF NO 1. of 2010, 40 available at http://eacj. org/?cases=honorable-sitenda-sebalu-vs-secretary-general-of-the-eac-attorney-general-of-the-republic-of-uganda-honorable-sam-k-njuba-and-the-electoral-commission-of-uganda (last accessed on 28 July 2018).

64 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) paras 60-62.

65 *Jeličić v Bosnia and Herzegovina* Application no. 41183/02 (Judgment) E. Ct. of H. R. (31 October 2006) at para 38. The European Court stated in respect of article 6(1) that:

"*Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 § 1 should describe in detail the procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions. To construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would indeed be likely to*

Fick this Court held that enforcement of the SADC Tribunal's judgment implicated rights under section 34 of the Constitution stating that:

> *"[S]ection 34 of the Constitution must be interpreted generously to grant successful litigants access to our court for the enforcement of orders, particularly those stemming from human rights or rule of law violations provided for in treaties that bind South Africa.*"[66]

83. The Court in *Fick* in deciding to enforce the judgment of the Tribunal was fulfilling the very purpose of international tribunals: providing access to a court that could grant a remedy when another member state, Zimbabwe, refused.

84. It is accordingly submitted that the jurisdiction of the Tribunal both with the 2011 Suspension and the adoption of the 2014 Protocol goes against the jurisdictional trend that is prevailing on the African continent and elsewhere with regard to regional and continental courts. These jurisdictions demonstrate that access to regional and international courts is an integral aspect of access to justice.

85. In interpreting section 34 of the Constitution, this Court must consider international law and may consider foreign law. In our submission, the prevailing foreign practice and law demonstrates that section 34

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lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6."

See also *Hornsby v Greece* Application No. 18357/91 (Judgment) E. Ct. of H. R. (19 March 1997).

66 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 62.

undoubtedly extends to the right of South Africans to access an international court in the form of the Tribunal.

86. Conduct that runs contrary to this prevailing trend, we submit, is contrary to our Constitution contemplating that South Africa "*play a full role as an accepted member of the international community*". In *Southern African Litigation Centre*, the Supreme Court of Appeal articulated this interpretation as follows:

> *"The Constitution incorporated [international law] provisions pursuant to the goal stated in the Preamble that its purpose is to '[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'. From being an international pariah South Africa has sought in our democratic state to play a full role as an accepted member of the international community."*[67]

87. Indeed, cases like *Fick* have shown that an international court in the form of the Tribunal is sometimes the only effective remedy to vindicate the violation of rights. Interpreting section 34 to encompass the right to access an international court will facilitate access to justice and provide further protection against rights violations and, in our submission, would "*promote the values that underlie an open and democratic society based on human dignity, equality and freedom*" as required by section 39(1)(a) of the Constitution.

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67 *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA) para 63.

The infringement

88. In this section, we proceed to set out why the President's conduct, in participating in the 2011 Suspension and the 2014 Protocol amounts to an infringement of the right in section 34 of the Constitution.

89. This case concerns two presidential actions that had a regressive effect on the rights of individuals in the SADC region to access an international court for attaining an effective remedy against the violation of their human rights.

    89.1. First, the 2011 Suspension caused the Tribunal to cease all operations. The 2011 Suspension led to the de facto closure of the Tribunal. It can no longer function as it is no longer staffed by judges or taking cases. There is simply no way for South Africans to approach the Tribunal.

    89.2. Second, the 2014 Protocol stripped the Tribunal's power to adjudicate disputes between individuals and member states. It limits the Tribunal's jurisdiction to decide disputes between member states only. The 2014 Protocol is attempting to finish off the work of the 2011 Suspension, forever closing the door for South African citizens and others in the SADC region from accessing the Tribunal to adjudicate human rights claims.

90. Prior to these actions, South African citizens could approach the Tribunal to resolve any dispute relating to human rights violations between themselves and any of the member States in the SADC region. The right to access an international court in the form of the

Tribunal had accordingly vested prior to the 2011 Suspension and the 2014 Protocol.

91. By participating in the 2011 Suspension and the 2014 Protocol, the President's conduct was diametrically opposed to the right of South African citizens in section 34 of the Constitution to access a court, including an international court in the form of the Tribunal. Instead of facilitating access to justice, the President's conduct was regressive. It infringed the right to access a court by completely depriving South African citizens of their vested right to access an international court in the form of the Tribunal. The President did so without public consultation or Parliamentary consent and only in the name of comity.

92. Section 7(2) of the Constitution imposes a positive duty on the executive to give effect to fundamental rights.[68] Regardless of whether an organ of State was empowered to act as it did, it must act consistently with section 7(2).[69] It is therefore impermissible for the national executive to exercise its powers, even those provided for under section 231(1) of the Constitution, in a manner that limits or infringes fundamental rights, such as in the present case. Where the Constitution requires that rights be progressively realised, our courts have consistently held that retrogressive steps to fundamental rights are unconstitutional unless properly justified.[70]

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68 Section 7(2) of the Constitution states: "*The state must respect, protect, promote and fulfil the rights in the Bill of Rights.*" *See* also *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 189.

69 *Head of Department, Department of Education, Free State Province v Harmony High School* 2014 (2) SA 228 (CC) para 208.

70 *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 34; *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 32; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 138.

The infringement is unjustifiable

93. After a rights limitation has been established, the State bears the *onus* of justifying the limitation in terms of section 36(1) of the Constitution.[71]

94. Limitations of rights enshrined in the Bill of Rights must meet the threshold test enshrined in Section 36 of the Constitution. The President's action must qualify as a "*law of general application*"; must be "*reasonable and justifiable*"; must be "*based on human dignity, equality and freedom*" taking into account "*the importance of the limitation*"; "*the nature and extent of the limitation*"; the "*relation between the limitation and its purpose*".

95. In the present case, SALC submits that the President's conduct which limited constitutional rights under section 34 cannot be justified in terms of section 36 of the Constitution. This is because the President's conduct does not amount to a "*law of general application*" as contemplated in section 36. This is a jurisdictional pre-condition that must be established before an assessment as to whether a rights infringement is reasonable and justifiable may be conducted. In *Dladla,* this Court confirmed this principle thus:

> *"Now that it has been established that the applicants' rights have been limited, the next question is whether the limitations of these rights can be justified under section 36(1) of the Constitution. For the limitations to be justified*

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71 *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening* 2001 (4) SA 491 (CC) para 18. *S v Zuma* 1995 (2) SA 642 (CC) para 21.

> *under section 36, they must first and foremost be authorised by a 'law of general application'. This is a threshold test which must be met before a justification analysis may begin. …. Absent that law, the City may not invoke section 36 in an attempt to justify the limitations created by the rules in question.*"[72]

96. Similarly, in *Magidiwana,*[73] Legal Aid denied certain people state funded representation in front of a Commission on the basis of a policy decision. This Court approved the finding of the High Court that: "*Legal Aid could not justify its infringement of the miners' constitutional rights because it was not pursuant to a law of general application but merely the exercise of discretion*".[74]

97. International and comparative law also imposes similar requirements. For example, the African Charter allows for limitations of rights in certain circumstances (the so-called "claw back clauses"). Notably in relation to this case, the African Commission has found that "*the limitation of the right cannot be used to subvert rights already enjoyed*"[75] and that any limitations must be consistent with international law.[76]

98. The limitations test under the European Convention uses the terms "*prescribed by law*" or "*in accordance with the law*" rather than law of

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72 *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) para 52.

73 *Legal Aid South Africa v Magidiwana* 2015 (6) SA 494 (CC).

74 *Legal Aid South Africa v Magidiwana* 2015 (6) SA 494 (CC) para 87.

75 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) at para 70.

76 *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) para 92; *Constitutional Rights Project v Nigeria* (2000) AHRLR 191 (ACHPR 1998) at para 57.

general application. The European Court has also provided that to constitute a "*law*" for the purposes of limitation, the law must, similar to the South African jurisprudence, be adequately accessible and foreseeable, allow individuals to regulate their conduct, and to protect people from arbitrary exercises of state power.[77] And similarly, unfettered discretion in the hands of the executive branch is dangerous and "*not prescribed by law*" for limitations purposes.[78] In the case *Hasan and Chaush v Bulgaria*, the European Court of Human Rights held that:

> *"In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power."*[79]

99. In our submission, in order for fundamental rights to be limited the limitation must be by way of a "*law of general application*", as contemplated in section 36 of the Constitution. The President's conduct does not amount to a "*law of general application*". Accordingly, any limitation of fundamental rights occasioned by the President's conduct can never amount to a justifiable limitation for purposes of section 36 of the Constitution.

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77 *Hasan and Chaush v Bulgaria* Application No. 30985/96 (Judgment) E. Ct. of H. R. (26 October 2000) para 84.

78 *Hasan and Chaush v Bulgaria* Application No. 30985/96 (Judgment) E. Ct. of H. R. (26 October 2000) para 84.

79 *Hasan and Chaush v Bulgaria* Application No. 30985/96 (Judgment) E. Ct. of H. R. (26 October 2000) para 84.

100. Authority for this proposition is the minority judgment of Justice Kriegler in *Hugo*.[80] In that case, the President exercised his power to pardon women in prison with children under the age of 12. While the majority did not make a finding on the issue of whether the President's action could amount to a law of general application, Kreigler J, in dissent, addressed the issue, stating:

> *"The exercise by the President of the powers afforded by s 82(1)(k) - even in the general manner he chose in this instance - does not make 'law', nor can it be said to be 'of general application'. The exercise of such power is non-recurrent and specific, intended to benefit particular persons or classes of persons, to do so once only, and is given effect by an executive order directed to specific state officials. I respectfully suggest that one cannot by a process of linguistic interpretation fit such an executive/presidential/administrative decision and order into the purview of s 33(1). That savings clause is not there for the preservation of executive acts of government but to allow certain rules of law to be saved."*[81]

101. In our submission, the learned Justice is undoubtedly correct. A constitutional democracy is founded on the principle of social contract. As of birth-right, human beings are entitled to certain

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80 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

81 *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) paras 70-1 Dissent Kriegler J, fn 7). This was a judgment under the interim Constitution, where the limitations clause was found in section 33. However, limitations in that clause were still subject to the same requirements.

fundamental rights, which in South Africa are entrenched in the Bill of Rights.

102. These citizens then participate in government through a system a representative democracy,[82] where citizens elect representatives to serve on their behalf in the legislative branch of government. These representatives in the legislature may then, by way of majority vote, limit citizens' fundamental rights by passage of legislation. The executive sphere of government administers the legislation and the judicial sphere of government assesses whether it has unjustifiably infringed fundamental rights against the principles in section 36. The President comprises part of the executive sphere of government; he is not a law maker, nor can he exercise plenary legislative power. As this Court held in *Shuttleworth*:

> *"The second main plank of the dissent is about delegation of legislative power. It is that Parliament may only delegate subordinate regulatory authority to the Executive and may not assign plenary legislative power to another body. The regulation-making power granted to the President in section 9(1) of the Act effectively assigns plenary legislative power to the President. That is constitutionally impermissible."*[83]

103. Indeed, in *Democratic Alliance*, the Full Bench of the Gauteng High Court held that the social contract is the reason why section 231(2) of

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82 Our Constitutional scheme also contemplates participatory democracy in certain instances which are not relevant for present purposes. See *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 115.

83 *South African Reserve Bank v Shuttleworth* 2015 (5) SA 146 (CC) para 65.

the Constitution contemplates legislative approval before international agreements become domesticated:

> *"[T]he approval of an international agreement in terms of s 231(2) creates a social contract between the people of South Africa, through their elected representatives in the legislature, and the national executive. That social contract gives rise to the rights and obligations expressed in such international agreement. The anomaly that the national executive can, without first seeking the approval of the people of South Africa, terminate those rights and obligations, is self-evident and manifest."*[84]

104. The purpose of ensuring that rights are limited via a law of general application is to protect the rule of law including protecting people from arbitrary violations into their rights[85] and allowing people to have access to such laws so they conform their behaviour to them.[86]

105. In order to protect these fundamental rights, this Court has regularly found laws that provide unfettered discretion to the executive branch do not qualifying as laws of general application in that they undermine the requirement that is law is "*stated in a clear and accessible manner*". For example, in *Dawood*, this Court found immigration rules

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84 *Democratic Alliance v Minister of International Relations and Cooperation (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP) para 52.

85 *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) paras 85-6; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 101.

86 *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) para 44. *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (8) BCLR 837 (CC), 2000 (3) SA 936 (CC) para 47.

giving immigration officials the discretion to refuse certain permits without any criteria. The Court stated:

> *"It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision."*[87]

106. We further submit that, on a proper construction, the interpretation that the reference to "*law of general application*" in section 36 only contemplates having legal authorization, or only requires that rights be limited "*in terms of*" conduct empowered by "*law of general application*", with respect, incorrect.[88] We say this because such an interpretation is tautologous. Section 1(c) of the Constitution, which entrenches the rule of law as a founding principle, immediately renders any exercise of public power taken without the necessary authorization *ultra vires* and, accordingly, unlawful.

107. Accordingly, section 36 requires heightened scrutiny in that it implicates the limitation of constitutionally entrenched, fundamental

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87 *Dawood and Another v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 para 47.

88 *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) para 98.

rights.[89] Moreover, section 39(1)(a) of the Constitution requires that a court, when interpreting the Bill of Rights, must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. An interpretation that section 36 only requires legal authorization is impermissibly tautologous,[90] whereas an interpretation that only the legislative passed law may limit rights accords with the notion of the social contract, representative democracy and the system of checks and balances implicit in our constitutional conception of the separation of powers.[91]

108. In light of the above, we submit that our constitutional conception of the separation of powers is such that vested fundamental rights and freedoms of citizens (especially where vested by way of legislative approval in terms of section 231(2) of the Constitution) may only be limited by a majority of their delegated representatives in the legislature by way of passage of a law of general application. That fundamental rights may only be limited in this way accords with the principle of the rule of law, which the executive arm of government must adhere to.

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89 Section 74(2) of the Constitution provides that:

"(2) *Chapter 2 may be amended by a Bill passed by—*

(a) the National Assembly, with a supporting vote of at least two thirds of its members; and

(b) the National Council of Province, with a supporting vote of at least six provinces."

90 *Keyter v Minister of Agriculture* 1908 NLR 522; *Commission for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A).

91 *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) para 133.

109. In the present case, the President unilaterally acted in a way that divests South Africans of fundamental rights. While the President's conduct applied generally in that divested all South Africans of their fundamental right, it was not "*law*". The President is empowered by the Constitution to wield executive power and by the SADC Protocol to make policy for SADC. This general power does not authorise the limitation of rights and is too general to be considered a "*law*" for the purposes of limitation. This falls within the power and purview of the legislative branch of government, not the executive. Accordingly, the President's conduct is incapable of justification in terms of section 36 of the Constitution.

110. In our submission, the President's conduct was the arbitrary type of action section 36 is trying to protect against. The President's participation in the suspension of the Tribunal was one of pure discretion. It was admitted by the State that the decision was driven by thoughts of comity, but clearly not by thoughts of access to justice or the human rights of South African citizens he is constitutional bound to protect.

111. It is an affront to the principle of the rule of law, explicitly enshrined in the Constitution, to allow the President to unilaterally deprive South African citizens of vested rights protected under the Constitution. The President should not be able to simply make a decision under the umbrella of his general executive power (as opposed to say having been delegated a specific power by Parliament) to divest citizens of their fundamental rights without the consent or approval of the citizens delegated Parliamentary representatives.

112. In our submission, the President could not grant South Africans the right to approach the Tribunal without the agreement of Parliament as Parliament had to ratify the Treaty originally. It makes little sense that the President could unilaterally remove the rights vested by Parliament without the approval of Parliament. This is particularly important in the case of divestment of rights because the Constitution explicitly recognises that limitation of rights is subject to strict requirements.

113. The President has broad powers under the Constitution especially when acting as Head of State at the international level. However, because the President's conduct limited fundamental rights other constitutional requirements needed to be complied with. Accordingly, by limiting the rights provided for in section 34 of the Constitution and not complying with section 36 of the Constitution, the President's conduct amounted to an unjustifiable infringement of constitutional rights. Accordingly, this Court should confirm the High Court's declaration of such.

COSTS IN CONSTITUTIONAL LITIGATION

114. At the outset, it must be stated that SALC did not pray for costs either in the High Court or in this Court. That being said, and as is demonstrated below, the High Court exercised a true discretion when awarding SALC and the Centre for Applied Legal Studies (CALS) costs. What we seek to illustrate hereunder is not why SALC is entitled to costs, but instead, to detail the instances in which a court may exercise its discretion in awarding costs to an *amicus curiae* and

to assist this Court in evaluating the State Respondents' appeal against the High Court's costs order.

115. In ordinary civil litigation, the purpose of a costs order is to indemnify the successful party and to refund expenses actually incurred.[92] However, ever since this Court's decision in *Biowatch*,[93] our courts have adopted a different approach to costs in constitutional litigation.

116. In *Biowatch*, the central question before this Court was "*whether the general principles developed by the courts with regard to costs awards need to be modified to meet the exigencies of constitutional litigation*".[94] In determining the proper approach to costs in these circumstances this Court went on to hold that:

116.1. "*The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice*."[95]

116.2. "*[W]hat matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it*."[96]

116.3. The rationale for costs being treated differently in constitutional litigation was that—

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92 *Minister of Police v Kunjana* [2016] ZACC 21 para 43 (citing *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488; *Payen Components South Africa Ltd v Bovic Gaskets CC* 1999 (2) SA 409 (W) at 417D).

93 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC).

94 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) para 12.

95 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) para 16.

96 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) para 20.

> *"constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy… [I]t is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door."*[97]

117. Read together, these principles suggest that an *amicus* may be awarded costs in instances where its submissions:

117.1. promote the advancement of constitutional justice;

117.2. assist a court to come to a proper conclusion and thus enrich the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy;

117.3. ensures that the law and the State's conduct are in line with the Constitution.

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[97] *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) para 23.

118. The latter two reasons accord with the State's duty under section 165(4) of the Constitution to "*assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts*".

119. Even though an *amicus* in not "*generally entitled to be awarded costs*"[98] our courts have indeed awarded an *amicus* its costs where:

119.1. The *amicus'* arguments were "*of great value*" in dealing with a case and its legal submissions provided "*valuable insight*".[99]

119.2. A party has "*unreasonably*" opposed the admission of an *amicus*.[100]

120. This Court is empowered to make such a costs award in terms of its power in section 172 of the Constitution to "*make any order that is just and equitable*" in a constitutional matter.

121. When the High Court awarded costs in favour of SALC, it exercised a true discretion. Accordingly, this Court's enquiry is not whether the High Court's decision to award costs was correct, but rather has the State shown that the High Court did not exercise its discretion judicially or that it did so based on an incorrect appreciation of the facts or incorrect principles of law.[101] The High Court must have

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98 *Hoffman v South African Airways* 2001 (1) SA 1 (CC) para 63.

99 *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA) para 111. See also *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA) para 52; *South African Human Rights Commission v Qwelane* 2018 (2) SA 149 (GJ) para 69.

100 *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA) para 52.

101 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) para 29, quoting *Giddy NO v JC Barnard and Partners* 2007 (5) SA 525 (CC).

"*committed some 'demonstrable blunder' or reached an 'unjustifiable conclusion'.*"[102] If this Court is satisfied that the State has done so, then only may this Court interfere with the High Court's discretion in awarding costs to SALC and CALS.

122. In awarding SALC and the CALS its costs, the High Court acted within its discretion. In light of the above principles, a costs order may be awarded to an *amicus*.

CONCLUSION

123. It is respectfully submitted that in view of the foregoing submission, the President acted unconstitutionally in, first, participating in the 2011 Suspension; and second, in participating in the adoption and signing of the 2014 Protocol. The president failed to follow the prescribed amendment procedure in the Treaty in doing so. The cumulative effect of these two executive actions is the unjustifiable infringement of South African citizens' constitutional right to access an international court in the form of the Tribunal. In SALC's submission, the High Court's order should be confirmed.

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Thai Scott
Counsel for SALC
Chambers, Sandton
03 August 2018

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102 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) para 31.

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