IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case Number: .....
NGHC Case Number 20382/2015

In the application 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) LTD	Sixth applicant
FRANCE FARM (PVT) LTD	Seventh applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Third respondent
and	
SOUTHERN AFRICAN LITIGATION CENTRE	First *amicus curiae*
CENTRE FOR APPLIED LEGAL STUDIES	Second *amicus curiae*

THE RESPONDENTS' NOTICE OF APPEAL IN TERMS OF RULE 16(2) OF THE CONSTITUTIONAL COURT RULES READ WITH SECTION 172(2)(d) OF THE CONSTITUTION

PLEASE TAKE NOTICE THAT the abovenamed Respondents (**the State**) appeal against the confirmation of the following parts of the order and judgment granted by the North Gauteng High Court (**the Court**) on 1 March 2018 under case number

20382/2015:

(a) "*[the President's]...signing of the 2014 Protocol on the SADC Tribunal is declared unlawful, irrational and thus, unconstitutional*" (part of Order 1), and

(b) "*the First and Second Amicus Curiae, are entitled to the costs of the application, including the costs of two Counsel*" (part of Order 2).

THE GROUNDS OF APPEAL

1. The Court erred in declaring the President's signature of the 2014 Protocol on the SADC Tribunal (**2014 Protocol**) to be unlawful, irrational and thus, unconstitutional.

    1.1. The Court ought to have dismissed the application for this declaration since (a) the President's signature was neither unlawful nor irrational, and (b) in any event, it was premature and a violation of the separation of powers to determine the constitutionality at this stage.

2. The Court's determination that the President's signature of the 2014 Protocol was unconstitutional is predicated on a fundamental error of fact and/or law:

    2.1. The Court appears, without clearly determining the issue, to have accepted that the 2014 Protocol bound South Africa merely on the President's signature. This appears, *inter alia*, from the fact that the Court held that "*the Tribunal's jurisdiction was simply signed away*" by the President (para 69), and that the President's signature "*severely undermined the crucial SADC institution, the Tribunal*" (para 71);

    2.2. Alternatively, the Court erred by failing to determine the issue of whether the 2014 Protocol was binding on signature, when this was

essential for establishing the lawfulness and rationality of the President's signature.

3. The Court ought to have found that:

3.1. The 2014 Protocol was an international agreement which required ratification to become binding, not signature (which signature was thus a formal signature, not a binding signature).

3.2. The 2014 Protocol would only enter into force, if and when two-thirds of the member states had ratified the Protocol, in accordance with their own constitutional procedures, by depositing instruments of ratification with SADC.

3.3. The 2014 Protocol, which the President signed, expressly provides for this:

3.3.1. Article 52 provides that, "*This Protocol shall be ratified by Member States who have signed the Protocol in accordance with their constitutional procedures.*"

3.3.2. Article 53 provides that, "*This Protocol shall enter into force thirty (30) days after the deposit of the Instruments of Ratification by two-thirds of the Member States.*"

3.3.3. Article 55(1) specifies how an instrument of ratification is deposited: "*all instruments of Ratification ... shall be deposited with the Executive Secretary of SADC who shall transmit certified copies to all Member States.*"

3.4. The 2014 Protocol, therefore, would enter into force, if and when instruments of ratification were deposited by 10 states (since SADC has 15 member state).

3.5. It is only if and when the 2014 Protocol entered into force that it would change the Tribunal's jurisdiction by repealing the 2000 Protocol on the Tribunal in SADC (**2000 Protocol**). This is so since

the 2014 Protocol makes clear in article 48, that "*[t]he 2000 Protocol on the Tribunal in the Southern African Development Community is repealed with effect from the date of entry into force of this Protocol.*"

3.6. The State confirmed on affidavit that:

3.6.1. it has not as yet decided whether to seek to ratify the Protocol (the decision was pended given the application to challenge the constitutionality of the signature);

3.6.2. if the State decides that South Africa should ratify the Protocol, then it will place the Protocol before Parliament for its approval in terms of section 231(2) (which must then comply with Parliament's constitutional obligation to undertake public participation);

3.6.3. it would only be if Parliament approved the Protocol, that the State would then proceed to lodge an instrument of ratification with SADC.

3.7. All of this is without prejudice to the question of whether, as a matter of domestic law, the Protocol is a section 231(2) or (3) agreement (under section 231 of the Constitution). Since, even if, for arguments sake, the Protocol was a section 231(3) agreement which does not require approval from Parliament to be made binding, all this would mean is that the State would be at liberty, as a matter of domestic constitutional law, to deposit the instrument of ratification with SADC to bind South Africa, without first obtaining Parliament's approval. But, the State has not deposited an instrument of ratification. The State has said it would approach Parliament for approval before doing that.

3.8. The 2014 Protocol is, in any event, clearly a section 231(2) agreement, which requires Parliament's approval, after negotiation and signature, to be made binding:

3.8.1. The 2014 Protocol expressly requires ratification, in accordance with each state's "*constitutional procedures*" (Article 52). The Pretoria High Court in *ICC Withdrawal* accepted that where an international agreement requires ratification, then it must be tabled under section 231(2) since the Court held that "*ratification... requires prior parliamentary approval in terms of s 231(2).*"[1] This is in accordance with the Constitutional Court's determination in *Glenister II*.[2]

3.8.2. In any event, the 2014 Protocol is not an agreement of a "*technical, administrative or executive nature*" (as provided for in section 231(3)). As the Western Cape High Court held in *Earthlife Africa* the agreements that can be tabled under 231(3) are "*a limited subset of run of the mill agreements (or as Professor Dugard puts it, agreements 'of a routine nature, flowing from daily activities of government departments') which would not generally engage or warrant the focussed attention or interest of Parliament.*"[3] The 2014 Protocol, if it were to come into forced, would repeal and replace the 2000 Protocol; it would govern the Tribunal, and in particular change the jurisdiction of the Tribunal, removing its ability to entertain individuals complaints. Therefore, it is not a run of the mill agreement; it is not routine in nature; it would warrant the focussed attention of Parliament. This is precisely why the State has indicated that prior to ratifying the Protocol it would first seek Parliament's approval.

3.9. Moreover, if there was any doubt on this score, then, as the Western Cape High Court in *Earthlife Africa* found, even if an agreement

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[1] *Democratic Alliance v Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP) (***ICC Withdrawal***) para 47.

[2] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (***Glenister II***) para 95, "*[u]nder our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic.*"

[3] *Earthlife Africa and Another v Minister of Energy and Others* 2017 (5) SA 227 (WCC) (***Earthlife Africa***) para 114.

might in principle fall within the terms of section 231(3), and therefore not require Parliament's approval, the State would be entitled to make use of the more onerous procedure in section 231(2) to obtain parliamentary approval in order to make the agreement binding (para 137). In this matter the State has been clear, it would not seek to bind South Africa to the Protocol, by depositing an instrument of ratification, without first approaching and obtaining the approval of Parliament.

3.10. Section 231(1) of the Constitution only gives the executive a preliminary power to undertake the "*exploratory work*" of negotiating and signing international agreements, but this does not bind South Africa to such international agreements.[4] As was held by a full bench in the *ICC Withdrawal* case, the executive's signature of an international agreement "*has no direct legal consequences*".[5]

4. The Court erred in finding that the challenge to the constitutionality of the President's signature of the 2014 Protocol was not premature at this stage.

4.1. The Court ought to have considered and applied the decision by the Western Cape High Court in *Earthlife Africa*.[6] In that matter the Court held that it is premature and a violation of the separation of powers to allow a challenge to the rationality and constitutionality of the signature of an international agreement if the agreement would still need to be tabled before Parliament for approval to make it binding.

4.2. The Court also ought to have found that a challenge to the signature of an international agreement, which is subject to ratification, is analogous to a challenge brought to the introduction of a Bill before Parliament, where a Court is asked to intervene prematurely in the legislative process. In *Glenister I* the Constitutional Court dismissed an application, *inter alia*, seeking to declare that the Cabinet's initiation of legislation (by introducing a bill into Parliament) for the

[4] *ICC Withdrawal* para 55; *Glenister II* para 95.
[5] *ICC Withdrawal* para 47.
[6] *Earthlife Africa* supra.

abolition of the Scorpions (the then corruption fighting unit in the National Prosecuting Authority) was unconstitutional and invalid.[7] The Court dismissed the application on the basis of prematurity. It held that it would only be in exceptional circumstances, where clear and immediate harm could be shown, that "*will be material and irreversible*", which could not be remedied in due course, that the Court would consider intervening at the preliminary stage, before Parliament had yet considered the Bill.[8]

4.3. The Court erred in finding that, to the extent necessary, there were exceptional circumstances in this matter (paras 43 - 45). The Court ought to have found that:

4.3.1. There was no clear and immediate harm caused by the signature, nor were any rights threatened.

4.3.2. The applicants' concerns related to any change to the jurisdiction of the Tribunal from being able to hear individual complaints to only being able to hear inter-state complaints. However, the 2014 Protocol would only have the effect of changing the jurisdiction of the Tribunal if it comes into force.

4.3.3. Because the signature of the 2014 Protocol does not bind South Africa, nor does it have any effect on bringing the Protocol into force, there could never be any material and irreversible harm that would require this Court's premature intervention.

4.3.4. The fact that 9 member states have signed the Protocol, is irrelevant to whether the 2014 Protocol might come into force. What is required is for 10 member states to deposit instruments of ratification with SADC. To date, none have been deposited.

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[7] *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) (***Glenister I***).
[8] *Glenister I* paras 43 and 46.

5. The Court erred in finding that the President's signature of the 2014 Protocol was irrational, since it amounted to the President "*signing away the jurisdiction of the Tribunal*" (para 69). The Court should have found that:

   5.1. The signature had no effect on the jurisdiction of the Tribunal since it did not, and could not, bring the 2014 Protocol into effect or bind South Africa to the 2014 Protocol.

   5.2. Article 48, read with Articles 52 and 53, make clear that the 2014 Protocol would only repeal the 2000 Protocol once it had been ratified by 10 of the 15 members state.

6. The Court erred in finding that the President's signature of the 2014 Protocol was unlawful, since it violated the terms of the SADC Treaty, the 2000 Protocol and the provisions of section 231(4) and (5) of the Constitution (paras 66 and 67). The Court should have found that:

   6.1. The President's signature could have no substantive effect on bringing the 2014 Protocol into force, and it was only if the 2014 Protocol came into force that it would repeal the 2000 Protocol.

   6.2. The SADC Treaty in Article 16 does not establish the jurisdiction of the Tribunal; it expressly leaves issues such as the Tribunal's jurisdiction to be determined by the Tribunal's Protocol.

   6.3. SADC and its member states were entitled to seek to reach agreement on a new Protocol that would replace the 2000 Protocol. It was permissible for the parties to the 2000 Protocol to seek to change it by entering into a new Protocol that would, once it had been agreed to and came into force, change the jurisdiction of the Tribunal. International law accepts that states can, by agreement, alter the jurisdiction of bodies which they create. In *Fick*,[9] decided more than a year before the President signed the 2014 Protocol, the Constitutional Court took account of this fact when it noted that "*[i]n August 2012 the Summit (the highest policy-making body of SADC)*

[9] *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) (***Fick***)

resolved that a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to disputes between member states."[10]

6.4. The President's signature of the 2014 Protocol, as authorised by section 231(1) of the Constitution, could never violate section 231(4) which deals with how international agreements are given domestic legal effect in South Africa, after they have been approved by Parliament under section 231(2).

6.5. Similarly, the President's signature of the 2014 Protocol, which does not bind South Africa, could never violate section 231(5) of the Constitution, which provides that international agreements entered into before the Constitution came into effect continue to bind South Africa.

7. The Court erred in finding the SADC Treaty and the 2000 Protocol "*had become domestic law*", as one of the grounds of irrationality (see para 69). The Court ought to have found that:

7.1. The question of whether the SADC Treaty and the 2000 Protocol "*had become domestic law*" was irrelevant to the rationality and lawfulness of the President's signature of the 2014 Protocol.

7.2. To the extent that the question of whether the SADC Treaty and 2000 Protocol were domestic law was found to be relevant to the issue of the constitutionality of the President's signature, then the Court should have held that:

7.2.1. Parliament has passed no national legislation domesticating either the SADC Treaty or the 2000 Protocol (unlike, for instance, the Rome Statute of the International Criminal Court which was domesticated by the Implementation of the Rome

[10] *Fick* fn 2, emphasis added.

Statute of the International Criminal Court Act 27 of 2002).[11]

7.2.2. The 2000 Protocol could never be self-executing in terms of section 231(4) (i.e. become part of domestic law absent national legislation) because it was never approved by Parliament.[12]

8. The Court erred in determining that the signature was irrational since there was no consultation with affected persons (including, in particular, those with vested rights before the Tribunal) (para 69). The Court ought to have held that:

8.1. The President's signature of the 2014 Protocol did not bind South Africa to the agreement, nor did it have any effect on bringing the Protocol into force.

8.2. Therefore, since the President's signature would not affect any rights under the 2000 Protocol, a rational decision did not require the President to consult with the public or any particular members of the public prior to signature.

8.3. The Constitution's structure and provisions envisage and support precisely this procedural approach. Section 231 empowers and mandates the executive to do the exploratory work of negotiating and signing international agreements, but it then requires the executive to go to Parliament, the people's representatives, to obtain authority and approval for South Africa to be bound by the international agreement.[13] The Constitution then also appropriately places a duty on Parliament to conduct public participation in relation to Parliament's legislative and other processes (which includes

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[11] See *ICC Withdrawal* para 35, where it was held that "*once parliament approves the agreement, internationally the country becomes bound by that agreement. Domestically, the process is completed by parliament enacting such international agreement as national law in terms of s 231(4)*"; see also *Glenister II* para 89.

[12] The only exception to the need for Parliament to pass domestic legislation to create domestic rights, is that section 231(4) of the Constitution indicates that "*self-executing*" provisions of international agreements that have been:

(a) approved by Parliament, and
(b) do not violate the Constitution or any legislation

will have domestic effect without domestic legislation.

[13] *ICC Withdrawal para 55.* See also *Glenister II*, para 95.

approving international agreements).[14] This would be the constitutionally appropriate time to conduct any necessary public participation since it is only when the Protocol is approved that it may be made binding on South Africa.

9. The Court erred in finding that "*diplomatic relations, is not a constitutionally-authorised purpose to be fulfilled through signing treaties under s 231(1) of the Constitution*".

9.1. The Court ought to have held that diplomatic relations (usually referred to as international relations) is precisely the purpose for which section 231(1) authorises the executive to negotiate and sign international agreements with foreign states.

9.2. As the Court held in the *ICC Withdrawal* case, section 231(1) empowers the executive to do exploratory work with other states before entering into a binding agreement.

10. The Court erred in finding that if the signature was not legally significant than it was effectively purposeless, and therefore irrational. The Court ought to have found that:

10.1. Section 231(1) only gives the President a preliminary power to undertake the "*exploratory work*" of negotiating and signing international agreements, but this does not bind South Africa to such international agreements.[15]

10.2. The President's signature of an international agreement which is subject to ratification "*has no direct legal consequences*".[16]

10.3. Thus, the signature of an international agreement subject to ratification is a formality, it does not bind the State, it provides the State with the opportunity to consider ratifying. But this does not mean it is purposeless. Rather, as found in the *ICC Withdrawal* case

[14] See *Earthlife Africa* para 114.
[15] *ICC Withdrawal* para 55.
[16] *ICC Withdrawal* para 47.

it is part of the executive's exploratory work.

10.4. This is in accordance with international authority. As Prof Malcolm Shaw QC has pointed out, in the current edition of his seminal work on international law, "*where the convention is subject to acceptance, approval or ratification, signature will in principle be a formality and will mean no more than that state representatives have agreed upon an acceptable text, which will be forwarded to their particular governments for the necessary decision as to acceptance or rejection.*"[17] Similarly, Aust, in his seminal work on the law of treaties, opines that "*[t]he normal reason for requiring ratification is that, after the adoption and signature of a treaty, one or more of the negotiating states will need time before it can give its consent to be bound. There can be various reasons for this. First, the treaty may require legislation. .... Second, even if no legislation is needed, the constitution may require parliamentary approval of the treaty, or some other procedure like publication, before the treaty can be ratified. Third, even if no legislative or other constitutional process has to be gone through, the state may need time to consider the implications of the treaty. That a state has taken part – even an active part – in the negotiations does not necessarily mean that it is enthusiastic about the subject, or the text that was finally agreed, or there may have been a change of government. The breathing space provided by the ratification process allows time for sober reflection before the instrument of ratification is lodged.*"[18] And, as Professor Crawford QC (currently a judge of the International Court of Justice) similarly points out in the current edition of *Brownlie's Principles of Public International Law*, "*[w]here the signature is subject to ratification, acceptance, or approval, signature does not establish consent to be bound nor does it create an obligation to ratify.*"[19]

11. The Court erred in finding that "*there [wa]s no explanation why the Protocol*

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[17] Shaw *International Law* (8th ed, 2017) pg 690-691.
[18] Aust *Modern Treaty Law and Practice* (3rd ed, 2013) p 94-95.
[19] Crawford *Brcwnlie's Principles of Public International Law* (8th ed, 2012) p 372.

was signed by the President if, as is now contended, it was not intended to bind South Africa." (para 69).

11.1. The Court should have found that the reason for the signature had been fully explained. In particular, the Court ought to have had regard to the averments, confirmed by the President, that:

11.1.1.1. The President took into account that the signature would not bind South Africa to the 2014 Protocol or bring in into force, since it was a formal signature.

11.1.1.2. The decision to sign the Protocol was taken as part of and in furtherance of South Africa's engagement with SADC, given that the SADC Summit (SADC's highest policy making body) had since 2012 approved the negotiation of a Protocol that would change the nature of the SADC Tribunal to only receive state complaints (as noted in *Fick*).

11.1.1.3. Therefore, the President's signature was intended to demonstrate no more than that South Africa would consider whether to ratification the Protocol which represented the outcome of the collective, multilateral, negotiations of the SADC member states and the current consensus view as to the appropriate mandate for the Tribunal.

11.1.1.4. It was in that context that the President decided that it was in South Africa's interests as a member of SADC to sign the Protocol, knowing that his signature would not bind South Africa to the Protocol.

11.1.1.5. The signature was therefore not an action that would signal South Africa's consent to be bound: it merely acknowledged the outcome of collective negotiation and drafting, and allowed for a further determination as to

whether to seek ratification of the Protocol (which ratification, as recognised in the Protocol, would first require compliance with South Africa's constitutional procedures, in particular, parliamentary approval).

12. The Court erred in finding that the President's signature was irrational and unconstitutional since he signed the Protocol "*without consultation and approval of the South African Parliament*" (para 69, read with para 66).The Court ought to have held that:

    12.1. As clear by section 231, it is only after the signature of an international agreement that Parliament must be approached to approved the international agreement (section 231(2)).

    12.2. The State confirmed that if it decided that South Africa should ratify the 2014 Protocol, the State would first place the 2014 Protocol before Parliament for approval.

13. The Court erred in ordering that the amici were entitled to their costs, particularly in circumstances where (a) neither amici had sought an order for costs and (b) the Court gave no reasons justifying such an order. The Court ought to have made no order of costs in favour the amici, since:

    13.1. As the Constitutional Court has held, an amicus "*is neither a loser nor a winner and is generally not entitled to be awarded costs.*"[20]

    13.2. The amici's submissions were not the predicate for the relief granted. In fact, the Court found that it was not constitutionally desirable (given the separation of powers) to make any determination of the second amicus curiae's main submission: that generally prior to the negotiating and signing of international agreements it is necessary for the executive to consult the public (para 50).

THE ORDER THAT OUGHT TO HAVE BEEN GRANTED

[20] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 63

14. The Court ought to have granted the following order in relation to the challenge to the President's signature of the 2014 Protocol:

    14.1. The application to have the President's signature of the 2014 Protocol declared unconstitutional is dismissed.

15. The Court ought to have granted no order of costs in respect of the first and second amicus curiae.

DATED AT PRETORIA ON THIS 23 DAY OF MARCH 2018.

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