IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 67/218

In the matter between:

THE LAW SOCIETY OF SOUTH AFRICA	**1st Applicant**
LUKE MUNYANDU TEMBANI	**2nd Applicant**
BENJAMIN JOHN FREETH	**3rd Applicant**
RICHARD THOMAS ETHERREDGE	**4th Applicant**
CHRISTOPHER MELLISH JARRET	**5th Applicant**
TENGWE ESTATE (PVT) LTD	**6th Applicant**
FRANCE FARM (PVT) LTD	**7th Applicant**
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**1st Respondent**
THE MINISTER OF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA	**2nd Respondent**
THE MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION OF THE REPUBLIC OF SOUTH AFRICA	**3rd Respondent**
And	
SOUTH AFRICAN LITIGATION CENTRE	***AMICUS CURIAE***

FILING SHEET

DOCUMENT: THE STATE'S FURTHER SUPPLEMENTRAY WRITTEN SUBMISSIONS IN RESPONSE TO CALS' WRITTEN SUBMISSIONS

ON ROLL :

FILED BY:

RESPONDENTS' ATTORNEYS
STATE ATTORNEY PRETORIA
SALU BUILDING
316 THABO SEHUME STREET
CNR THABO SEHUME (ANDRIES) AND FRANCIS BAARD (SCHOEMAN) STREETS
PRIVATE BAG X91
PRETORIA, 0001
Ref: 1832/2015/Z22
Tel: (012) 309 1578
Fax: (012) 309 1649/50
086 507 7007
E-mail: nqongqo@justice.gov.za
Enq: Ms N Qongqo

TO: THE REGISTRAR OF THE CONSTITUTIONAL COURT
CONSTITUTIONAL HILL
JOHANNESBURG

AND TO: : **1ST APPLICANT'S ATTORNEYS**
MOTHLE JOOMA SABDIA INC
DUNCAN MANOR
CNR JAN SHOBA AND BROOKS STREETS
BROOKLYN
PRETORIA
P O BOX 1686, ERMELO 2351
Tel: 012 362 3137
Ref: TA MOTHLE/LOUISE/TAM3499

AND TO: : **2nd to 7th APPLICANTS' ATTORNEYS**
HURTER SPIES INC
CNR D F MAAN AND UNION AVENUE
KLOOFSIG
CENTURION
Tel: 012 644 2676
Fax: 012 644 1997
Ref: W D Spies/AF0007

AND TO: **LAWYERS FOR HUMAN RIGHTS**
AMICUS APPLICANT'S ATTORNEYS
4TH FLOOR HEERENGRACHT BUILDING
87 DE KORTE STREET
BRAAMFONTEIN
Tel: 011 339 1960
Ref: 3/2016/SLP/WAYNE

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO: 67/18

In the matter of:

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

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**First Respondent**
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES OF THE REPUBLIC OF SOUTH AFRICA	**Second Respondent**
THE MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION OF THE REPUBLIC OF SOUTH AFRICA	**Third Respondent**

and

SOUTHERN AFRICAN LITIGATION CENTRE	**First Amicus Curiae**
CENTRE FOR APPLIED LEGAL STUDIES	**Second Amicus Curiae**

THE STATE'S FURTHER SUPPLEMENTARY WRITTEN SUBMISSIONS IN RESPONSE TO CALS' WRITTEN SUBMISSIONS

Table of Contents

1. INTRODUCTION

1.1. This Court has admitted the Centre for Applied Legal Studies (*CALS*) as an *amicus*, and granted it leave to file written submissions.[1] The State[2] files these supplementary submissions in response to CALS's written submissions.[3]

1.2. CALS's primary submission is that this Court should create a new "*default*" constitutional obligation on the executive (unrelated to the specific case before this Court), to consult with the public prior to signing all international agreements. CALS intentionally and expressly asks this Court to find an obligation that applies well beyond the remit of the particular international agreement and facts at issue in this matter.

1.3. There is clearly no legal basis for this. CALS's submission impermissibly amounts to asking this Court to create a new general constitutional obligation on the executive to conduct public participation in circumstances where (a) none is provided for in the Constitution in relation to treaty making or even in relation to any other exercise of executive power, (b) no South African case supports the argument, and (c) the Constitution already includes an express obligation to conduct public participation before international agreements are made binding

---

1 This Court's order and the direction issued by the Chief Justice both dated 15 August 2018.

2 The respondents.

3 In accordance with the directions issued by the Chief Justice dated 26 July 2018.

which is placed on Parliament.[4]

1.4. In these submissions, we deal thematically with CALS's key arguments. We do not repeat what we have already set out in the State's written submissions dated 2 August 2018 (*the State's main submissions*), save to emphasise certain relevant aspects. Accordingly, these further supplementary submissions should be read together with the State's main submissions (and, to the extent necessary, with the State's supplementary submissions in response to SALC). We continue to use the abbreviations employed in the main submissions.

1.5. We address the following issues:

1.5.1. The fact that there is no default constitutional obligation on the executive to consult with the public prior to the signature of an international agreement.

1.5.2. The practical issues in relation to the negotiation and signing of international agreements.

1.5.3. The irrelevance of Article 18 of the Vienna Convention.

1.5.4. The obligations in relation to international agreements that do not require ratification.

---

[4] Section 59(1)(a) and 72(1)(a), and *Earthlife Africa and Another v Minister of Energy and* Others 2017 (5) SA 227 (WCC) (*Earthlife*) para 114.

1.5.5. Parliament's constitutional role in relation to international agreements.

1.5.6. The executive's tabling of international agreements before Parliament for approval.

2. NO DEFAULT OBLIGATION TO HOLD PUBLIC CONSULTATION PRIOR TO SIGNATURE

2.1. In summary, CALS argues that there is a default requirement on the national executive to undertake public consultation prior to signature of all international agreements.

2.2. CALS has also sought to introduce evidence and arguments in relation to when consultation happens in respect of international agreements, and, in particular, SADC Protocols. This is introduced to support a submission that, if accepted, would amount to this Court creating a new general obligation on the national executive to conduct public consultation prior to the exercise of the executive's powers in section 231(1) of the Constitution.

2.3. On the other hand, the High Court made only the more limited finding, supported by the Applicants, that it was procedurally irrational for President Zuma not to consult with affected persons prior to the signature of the 2014 Protocol.

2.4. In the State's main submissions, we already address why it was not procedurally irrational for President Zuma to sign the 2014 Protocol without prior consultation.[5]

---

[5] State's main written submissions paras 4.41 – 4.48.

In summary:

2.4.1. President Zuma's signature of the 2014 Protocol did not bind South Africa to the agreement, nor did it have any effect on bringing the 2014 Protocol into force. Therefore, President Zuma's signature did not and could not affect any rights under the 2000 Protocol. Therefore, there was no rational requirement to conduct consultation at the signature stage.

2.4.2. This is in line with the procedure created by the Constitution. Section 231 empowers and mandates the executive to do the exploratory work of negotiating and signing international agreements, but if an international agreement is to be made binding, the Constitution then requires the executive to go to Parliament to obtain authority and approval for South Africa to be bound by the international agreement. It is only if an international agreement becomes binding that it can have any effect on any (usually international) rights.

2.4.3. That is why the Constitution appropriately places a duty on Parliament to conduct public participation in relation to Parliament's legislative and other processes (which includes approving international agreements).[6] This is the constitutionally appropriate time to conduct any necessary public participation since it is only after Parliament has approved the Protocol that it is made binding on South Africa.

---

6 See *Earthlife* para 114, see sections 59(1)(a) and 72(1)(a) of the Constitution.

2.5. It follows that there is no general constitutional obligation for the national executive to consult prior to the signature of international agreements.

2.6. The power to negotiate and sign international agreements is conferred by section 231(1). Neither section 231(1), nor any other section of the Constitution, creates a requirement that the executive must facilitate public participation prior to the signature of international agreements.

2.7. Despite the courts considering the signature and ratification of international agreements under the Constitution on a number of occasions, no court has ever found that there was a duty on the executive to consult with the public prior to signature.[7]

2.8. Indeed, under the Constitution, the only general duty to ensure public participation rests on Parliament, in relation to its legislative and other processes (including the approval of international agreements).

2.9. However, the Constitution, and the principle of legality flowing from the rule of law, create no "*default*" obligation to conduct public consultation prior to executive action. That is why this Court has held that "*executive decisions may be set aside **only** if they are irrational and **may not ordinarily be set aside because they are merely unreasonable or procedurally unfair***".[8] This Court emphasised that the

---

[7] See e.g. *Democratic Alliance v Minister of International Relations and Cooperation and Others 2017 (3) SA 212 (GP) (ICC Withdrawal)*; *Earthlife*; *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) *(Glenister II)* and *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC) (*Geuking*).

[8] *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) *(DA v the President)* para 41, emphasis added; see also *Masetlha v President of the Republic of South Africa* 2008 (1) SA

reason for limiting review of executive decisions to rationality, and not generally allowing review for procedural unfairness or unreasonableness, is "***precisely to ensure that the principle of the separation of powers is respected and given full effect.***"[9]

2.10. Thus, the courts have never found that executive action was irrational for failure to conduct general public participation. As the SCA pointed out in *Scalabrini*, rational decision-making does not imply "***a general duty on decision-makers to consult organisations or individuals having an interest in their decisions***".[10] At best this Court has held that a rational decision-making process may require certain decision makers to consult with specific affected persons, in specific instances.[11]

2.11. Therefore, rather than any "*default*" constitutional position, at best for CALS, in any particular situation a party would need to demonstrate why procedural rationality required consultation, and with whom, prior to signature of a particular international agreement.

2.12. CALS admits that the Constitution makes no express provision for its proposed new "*default*" obligation on the executive. But it argues that this is no obstacle.[12] This is plainly wrong. As this Court has emphasised, "*it cannot be too strongly*

566 (CC) para 77.

9 *DA v the President* para 41, emphasis added.

10 *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421(SCA) (*Scalabrini)* para 72, emphasis added.

11 *See* e.g. *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) (*Albutt*).

12 *CALS's* written submissions paras 111-112.

stressed that the Constitution does not mean whatever we might wish it to mean" and that if the language used in the Constitution "*is ignored in favour of a general resort to 'values' the result is not interpretation but divination.*"[13] Yet, this is precisely what CALS seeks to do:

2.12.1. It relies on a disparate series of rights, obligations and pragmatic arguments, none of which create a default obligation of public consultation for executive action in general, or in relation to the signing of international agreements in particular.

2.12.2. It then simply leaps to the conclusion that these create a new constitutional obligation on the executive, akin to the obligation already expressly placed on Parliament.

2.13. CALS has also sought to cherry-pick some isolated instances where consultation has occurred prior to signature. But, the State's evidence is clear: the national executive almost never conducts public consultation prior to signature of international agreements and there are no procedural documents, guidelines or policies which require or suggest that the executive needs to conduct any form of public consultation prior to signature.[14]

2.14. Therefore, the stark reality and thus incongruity of CALS's argument is that it is

---

[13] *Democratic Alliance v Speaker, National Assembly* 2016 (3) SA 487 (CC) para 46, refers with approval to Kentridge AJ findings in *S v Zuma and Others* 1995 (2) SA 642 (CC) paras 17 – 18.

[14] State's answering affidavit in response to CALS's introduction of further evidence (*CAA*) para 43, Record v12 p 1175.

effectively suggesting that for over twenty years of constitutional democracy the national executive has been violating a hereto-unknown constitutional obligation to consult the public prior to the signature of all international agreements.

2.15. The only proper constitutional question before this Court is whether consulting the public, or any particular individuals, prior to the signature of the 2014 Protocol was necessary for a rational process.

2.16. We have submitted in the State's main submissions that the process followed by President Zuma in signing the 2014 Protocol was procedurally rational, and in accordance with section 231.

2.17. However, even if this Court were to engage in the broader question of whether consultation prior to signature, although not expressly provided for in the Constitution, is required, there are good practical reasons why public consultation should occur only after signature, but before ratification.[15] We will briefly deal with this in the next section.

2.18. Lastly, the mere fact that CALS has been able to find a few countries where, due to government policies, legislation or express constitutional provisions, the executive does undertake consultation prior to signature of international agreements, can in no way be of any direct relevance as to whether that is what our Constitution requires.

---

[15] State's CAA paras 13 - 30, Record v12 p 1164-1169.

2.19. In fact, even CALS is forced to concede (in a footnote) that its extremely limited survey of other countries' laws and policies is "*incomplete*", and it is forced to admit that "*[t]here are other countries that do not have similar, formalised requirements for participation.*"[16]

2.20. In conclusion, if, as is clearly the case, CALS's real complaint is that for various pragmatic and policy reasons the executive should be obligated to consult with the public prior to signing international agreements, then its challenge is misdirected. The remedy is law reform.

3. THE MAKING OF INTERNATIONAL AGREEMENTS IN PRACTICE AND PRACTICAL CONSIDERATIONS

3.1. The State has set out the key facts and practical issues surrounding treaty negotiation, which create difficulties with any general obligation to consult prior to signature.[17] Given the approach taken by CALS, we draw those considerations to the Court's attention.

3.2. The negotiating of international agreements (and multilateral agreements in particular) is a dynamic process that takes into account various foreign policy considerations not only of any one country but of all participating states. Various states' positions can, and frequently do, change in the negotiations, with compromises being made by participating state delegations.

---

16 CALS's written submissions footnote 32.

17 State's CAA paras 20 -30, Record v12 p 1166-1169.

3.3. Therefore, the outcome of a negotiations process is not clear beforehand. One cannot foresee the dynamics of the process and the eventual compromises that may have to be made to reach consensus on a text that can be adopted by the parties negotiating it. Consequently, it will often be a relatively ineffective process to consult with the public on a "*negotiations text*" (a preliminary draft that may be provided by the organisation in question (for instance SADC)), before negotiations start. Through the process of international agreement negotiation (often over multiple meetings), a compromise text may finally be agreed on (in which much may have been removed, and much may have been added). It is then adopted by the negotiating parties. It is often at the same time as the international agreement is adopted that it is signed by the relevant Member States' representatives (to indicate that they accept the international agreement as the product of those negotiations).

3.4. Consequently, there is then for the first time a final text, representing the multilaterally agreed terms that the state parties (usually by way of compromise) agree to adopt, thus allowing them to consider whether or not they are willing to be bound by the terms of the international agreement which has been adopted and signed.

3.5. In the circumstances, any general requirement that the national executive must consult the public prior to the signature of an international agreement (that is during the exploratory negotiation stage) may be impractical and hamper the national executive's power to negotiate these agreements. This is so since during the fluid and dynamic negotiation process it may generally be impossible to

meaningfully consult the public first or even to properly disclose what many of the relevant foreign policy considerations being taken into account by the national executive are (given the confidential or secret nature of certain of those considerations, and the need to maintain such confidentiality, especially during the negotiation stage).

3.6. Therefore, public participation at the ratification stage, when a signed international agreement is placed before Parliament for approval, is the most appropriate stage for public participation to occur, taking into consideration questions of practicality and pragmatism.

3.7. It is undoubtedly for this reason that the Constitution provides (save in certain limited instances not relevant in this matter) that international agreements only bind South Africa after they have been approved by Parliament, and requires Parliament to facilitate public involvement in its processes.

3.8. Therefore, the fact that in very limited and treaty-specific circumstances some form of public consultation has taken place prior to signature of an international agreement cannot be used to imply that it will be either practical or advantageous in all instances. Rather the opposite is the case. It would generally be impractical and counter-productive, for the reasons set out above.

4. THE IRRELEVANCE OF ARTICLE 18 OF THE VIENNA CONVENTION

4.1. CALS does not dispute the finding by the full bench in the *ICC Withdrawal* case that signature has *"no direct legal consequences"*, and that this means that

signature does not bind South Africa to an international agreement.[18] Moreover, the court in *ICC Withdrawal* made clear that signature was merely part of the "*exploratory work*" undertaken by the executive.[19] However, in order to deal with the Court's findings in *ICC Withdrawal*, which are fatal to CALS's argument, CALS tries to make something of what they call the "*interim obligation*" in Article 18 of the Vienna Convention on the Law of Treaties (*the Vienna Convention*).[20]

4.2. Article 18(a) of the Vienna Convention provides, that "*A State is obliged to **refrain from acts which would defeat the object and purpose of a treaty when…it has signed the treaty** or has exchanged instruments constituting the treaty **subject to ratification**, acceptance or approval, **until it shall have made its intention clear not to become a party to the treaty**.*"[21]

Article 18 is not binding on South Africa

4.3. As CALS admits,[22] South Africa is not a party to the Vienna Convention (it has neither signed nor ratified the Vienna Convention). It is therefore not bound by the terms of Article 18. The content of Article 18 is therefore only of any relevance if it can be said to form part of customary international law.

4.4. CALS argues that South African courts regularly refer to the Vienna Convention.[23]

---

18 CALS's written submissions para 35.

19 CALS's written submissions para 55.

20 CALS's written submissions para 35 and paras 24 – 31.

21 Emphasis added.

22 CALS's written submissions footnote 2.

23 Ibid.

This is true, to an extent. However, no South African court has ever relied on or referred to Article 18. Instead, they often refer to articles, such as Article 31, which set out relatively trite propositions on how to interpret treaties.[24]

4.5. CALS further argues that "*in Glenister II, the Constitutional Court noted that '[a]lthough South Africa has neither signed nor ratified this Convention, commentators observe that South Africa employs the Convention in formulating its practice regarding treaties'* ".[25]

4.6. This statement was made in a footnote of *Glenister II*[26] only as support for a reference to the trite provisions of the Vienna Convention in relation to the interpretation of treaties.

4.7. There is a significant difference between generally relying on the Vienna Convention to guide how to interpret other treaties, and claiming that Article 18 is binding on South Africa. No South African court has ever suggested that Article 18 places some legal obligation on South Africa before it consents to be bound by the treaty.

4.8. In fact, when this Court and the SCA have referred to the Vienna Convention, it has generally been to reaffirm, as made plain by the Vienna Convention, that it is only when a party to a treaty consents (by ratification) to be bound by the treaty

---

[24] See e.g. *Krok and Another v Commissioner, South African Revenue Service* 2015 (6) SA 317 (SCA) para 27; and *Glenister II* para 187 fn 43.

[25] CALS's written submissions footnote 2.

[26] *Glenister II* para 187, footnote 43.

that the treaty creates legal obligations for that Party.

4.8.1. In *Minister of Justice v SALC* 2016 (3) SA 317 (SCA) the SCA held that "*the starting point must be that in terms of art 34 of the Vienna Convention on the Law of Treaties a treaty such as* ***the Rome Statute cannot impose obligations on states that are not parties to the treaty and have not consented to the imposition of such obligations.***"[27]

4.8.2. In *Glenister II,* Ngcobo CJ pointed out that

> **"The approval of an international agreement, under s 231(2) of the Constitution [by Parliament], conveys South Africa's intention, in its capacity as a sovereign State, to be bound at the international level by the provisions of the agreement.** As the Vienna Convention on the Law of Treaties provides, **the act of approving a convention is an 'international act . . . whereby a State establishes on the international plane its consent to be bound by a treaty'. The approval of an international agreement under s 231(2), therefore, constitutes an undertaking at the international level, as between South Africa and other States, to take steps to comply with the substance of the agreement."**[28]

4.9. In any event, as this Court found in *Harksen* "*the extent to which the Vienna Convention reflects customary international law is by no means settled.*"[29]

4.10. CALS also states that "*[I]n his seminal work on international law, Dugard writes that the Constitution is 'premised on the Vienna Convention', and treats art 18 as*

---

[27] *Minister of Justice v SALC* para 78.

[28] *Glenister II* para 91, emphasis added.

[29] *Harksen v the President* 2000 (2) SA 825 (CC) para 26

applying to South Africa despite the fact that South Africa has not ratified the Vienna Convention."[30]

4.11. However, CALS's apparent suggestion that *Dugard* supports the proposition that Article 18 applies to South Africa, is, we submit, misplaced.

4.12. In fact, in the relevant section of *Dugard* that CALS's refers to, Prof Dugard only briefly mentions the wording of Article 18 (after emphasising that a state is not bound by a treaty prior to ratification), he does not expressly say whether he views the Article 18 obligation as applicable to South Africa or why.

4.13. And, while *Dugard* does say that the Constitution is premised on the Vienna Convention, the full quote which CALS only partially refers to, in fact indicates, that Prof Dugard is referring to what the Vienna Convention says about how a country can become bound by a treaty, rather than any obligation in Article 18. The full quote is as follows "*[t]he 1996 Constitution is premised on the Vienna Convention, which allows final consent to be bound by a treaty to be given by ratification, accession or signature.*"[31]

4.14. It is one thing to say that the Constitution's structure in section 231 draws on or is premised on the Vienna Convention's (and customary international law's) distinction between signature and ratification. It is quite another to say that Article 18 (which is no-where foreshadowed, or provided for, in the South African

---

30 CALS's written submissions footnote 2.

31 Dugard *International Law* 4th ed (2012) p 416.

Constitution, and has never even been referred to by a South African court, despite many opportunities to do so) is somehow applicable and binding on South Africa.

4.15. CALS refers to two academic articles as support for its assertion that Article 18 is part of customary international law. However, if one considers the more recent and detailed standard commentary on the Vienna Convention, the authors of the chapter on Article 18 make clear that there is considerable debate as to whether Article 18(a) forms part of customary law. They view the position as ambiguous at best.[32] In fact, the authors, frankly admit that "*[a]n examination of international jurisprudence on this issue also leaves one confused as to whether the obligation contained in Article 18(a) of the Vienna Convention has customary status.*"[33]

Article 18 is irrelevant

4.16. Even assuming Article 18(a) is part of customary international law and thus binding on South Africa, it should be noted that:[34]

4.16.1. Article 18 does not create an obligation to ratify the treaty;

---

[32] Corten and Klein (ed), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford Commentaries on International Law) 2011, p 372 (chapter on Article 18 by Laurence Boisson de Chazournes, Anne-Marie La Rosa, and Makane Moise Mbengue).

[33] Corten and Klein (ed), *The Vienna Conventions on the Law* at p 374.

[34] See Aust *Modern Treaty Law and Practice* (3rd ed, 2013) p 103; Dugard *International Law* p 416; and Report of the International Law Commission (Fifty-ninth session 2007), General Assembly Official Record, Sixty-second Session Supplement No.10 (A/62/10) at 67 (italics in the original), emphasis added. See also the discussion in the main written submission in footnote 64.

4.16.2. It does not create an obligation to comply with the treaty;

4.16.3. It does not bring the treaty into force.

4.17. All that Article 18(a) does is to create a good faith duty, on the international plane, after signature and before an express decision has been taken not to ratify the treaty, to refrain from seeking to defeat the objects of the treaty (i.e. taking intentional steps to render the treaty inoperative). In other words, this duty is a negative duty (*to refrain*), not a duty to take positive action.

4.18. CALS, after postulating four different possible interpretations that could be given to Article 18 by certain academic writers (some of which are at odds with the plain meaning of Article 18), is forced to concede that "*there appears to be no clarity in international law on the correct test to adopt.*"[35]

4.19. Far from the general confusion suggested by CALS, the International Law Commission (the expert UN body tasked with codifying international law)[36] has relatively recently pointed out, that *"[i]t is **unanimously accepted** that article 18, paragraph (a), of the Convention does **not oblige a signatory state to respect the treaty, but merely to refrain from rendering the treaty inoperative prior***

---

35 CALS written submissions para 27.

36 Established by the UN in 1948 to initiate studies and make recommendations for the purpose of encouraging the progressive development of International law and its codification.

to its expression of consent to be bound".[37]

4.20. Similarly, Aust, in the most recent edition of his seminal work on the Law of Treaties, opines that, "*Article 18 requires a state 'to refrain from acts that would defeat the object and purpose of a treaty' when…it has signed the treaty... subject to ratification, until it shall have made its intention clear not to become a party to the treaty ...**It is sometimes argued (especially by law students) that a state that has not yet even ratified a treaty must, in accordance with Article 18, nevertheless comply with it or, at least, do nothing inconsistent with its provisions. This is certainly wrong, since the act of ratification would then have little or no purpose, the obligation to perform the treaty then not being dependent on ratification and entry into force.***"

4.21. CALS argues that it is not necessary for this Court to settle the debate as to how to interpret Article 18 and that whatever interpretation is adopted certain consequences may flow from signature.[38] This appears, we submit, to be rather unhelpful. The proper interpretation of Article 18 will determine what, if any, practical consequences may follow.[39] If the International Law Commission's definitive interpretation of the limited scope of Article 18, which it found to be unanimously held, is accepted, there can be very little consequence to signature,

---

37 Report of the International Law Commission (Fifty-ninth session 2007), General Assembly Official Record, Sixty-second Session Supplement No.10 (A/62/10) at 67 (italics in the original), emphasis added.

38 CALS's written submissions para 28.

39 CALS's written submissions para 27.

and none of legal moment.

4.22. In any event, and tellingly, CALS proposes no practical consequence (or things that South Africa would have to refrain from doing, that would affect domestic rights or any international law rights that citizens may enjoy) that would flow from applying the Article 18 duty to President Zuma's signature of 2014 Protocol.

4.23. This is hardly surprising. The Article 18 duty is an interim good faith duty to refrain from seeking to defeat the object of the treaty, until a decision is made whether to consent to be bound by the treaty, by ratification. It can create no practical consequences flowing from the signature of the 2014 Protocol, since the Protocol has as its object the defining of the jurisdiction of an international tribunal, if and when it comes into force. Therefore, complying with the Article 18 can have no effect on any individual's rights.

4.24. Put differently, even if the Article 18 obligation applies, mere signature of the 2014 Protocol would have no effect on any rights, since it would not change the fact that signature does not bind South Africa to the Protocol, and has no effect on bringing the Protocol into force (and it is only if the Protocol comes into force that it will remove the right of individuals to approach the Tribunal). International law and domestic law is clear: only ratification could bind South Africa, and only ratification can have any effect on whether the 2014 Protocol will enter into force.

4.25. Of course, any reliance on Article 18, to try and argue that signature is something more than a formality that does not bind South Africa to Protocol, is entirely at

odds with the pronouncements of the Courts in *ICC Withdrawal*, *Earthlife*, and *Glenister II*, the structure of the Constitution and the leading academic authorities on international law (as discussed in our main submissions).[40]

5. THE OBLIGATIONS IN RELATION TO INTERNATIONAL AGREEMENTS THAT DO NOT REQUIRE RATIFICATION

5.1. CALS appears to accept that the 2014 Protocol required ratification to become binding and that President Zuma's signature was, therefore, a non-binding signature. Nevertheless, it wishes this Court to also make pronouncements as to the obligation to consult in relation to all treaties, including in circumstances, where an international agreement provides that it becomes binding on signature.[41]

5.2. As made clear in the State's main submissions:

5.2.1. The 2014 Protocol expressly requires ratification to become binding, in accordance with each member states' own constitutional obligations. Therefore, as a matter of international law, the President's signature did not bind South Africa.

5.2.2. The 2014 Protocol not only requires ratification, but it is an international agreement which would change the jurisdiction of an international tribunal – it is plainly an agreement which would warrant Parliament's attention and interest. Therefore, as a matter of domestic law, the Protocol is a section

---

40 See State's main written submission paras 3.1 – 3.22.

41 CALS's written submissions paras 11 – 17.

231(2) agreement and requires parliamentary approval before it can become binding on South Africa.

5.2.3. In any event, the State has confirmed that if it decides that South Africa should become a party to and be bound by the 2014 Protocol, it will approach Parliament for approval to ratify the Protocol, which approval process will include public participation.

5.3. Therefore, the question of whether the executive should generally be required to consult prior to signing an agreement that would become binding without any parliamentary approval process simply does not arise in this case. The Court should not seek to make any determinations as to the nature of the obligations on the executive in hypothetical situations that are not before it.

5.4. Nevertheless, we make certain submissions for the benefit of the Court.

5.5. Section 231 makes clear that international agreements cannot be made binding on South Africa without parliamentary approval, save in very limited circumstances.

5.6. Those limited circumstances are as defined in section 231(3). The Court in *Earthlife* has made clear that only "*a limited subset of run-of-the-mill agreements (or as Prof Dugard puts it, agreements 'of a routine nature, flowing from daily activities of government departments') which would not generally engage or warrant the focused attention or interest of Parliament*" can be tabled under

section 231(3).[42]

5.7. Therefore, international agreements that are not run-of-the-mill and routine and would warrant Parliament's attention would have to be approved by Parliament in terms of section 231(2) before they can be made binding on South Africa. Thus, international agreements which would have any effect on the public or on any citizens' domestic or international rights, which would evidently warrant Parliamentary attention, would have to be tabled under section 231(2). The executive could only table an agreement under section 231(3) and thus bypass the need for parliamentary approval and the concomitant public participation, if the agreement is of such a nature that there would be no rational need to consult with the public as to its content.

5.8. Of course, if the executive were to bypass section 231(2)'s requirement for parliamentary approval (and therefore public participation), by tabling an agreement under section 231(3), which does require Parliament's attention, then this would be unconstitutional and should be set aside by the courts. This is precisely what occurred in *Earthlife*.

5.9. In *Earthlife*, the international intergovernmental agreement between South Africa and Russia (*the Russian IGA*) did not provide for ratification, however the Court held that the content of the international agreement made clear that it was not an agreement "*of a technical, administrative or executive nature*". Therefore, the Court held that the Russian IGA had to be tabled before Parliament for approval

[42] Para 114.

under section 231(2) (and not section 231(3)). The Court made this finding, and set aside the tabling under section 231(3), precisely because the nature of the agreement required Parliament's approval and the concomitant public participation process. That is why the Court held that ***"[t]he tabling of an IGA under s 231(3) permits the executive to bind South Africa to an agreement without parliamentary approval or the public participation that often accompanies any such parliamentary-approval process. Limiting those international agreements which may be tabled under s 231(3) to a limited subset of run-of-the-mill agreements (or as Prof Dugard puts it, agreements "of a routine nature, flowing from daily activities of government departments") which would not generally engage or warrant the focused attention or interest of Parliament would give optimal effect to the fundamental constitutional principles of the separation of powers, open and accountable government, and participatory democracy."***[43]

5.10. Thus, the Court made clear that it is only run-of-the-mill international agreements that do not require Parliamentary attention or interest, that can avoid the requirements of the 231(2) approval process (including public participation).

5.11. There may be very specific circumstances in which procedural rationality requires that certain persons be consulted prior to the signing of a particular section 231(3) agreement. If so, this can be dealt with on a case by case basis.

---

[43] Para 114.

6. PARLIAMENT'S CONSTITUTIONAL ROLE IN RELATION TO INTERNATIONAL AGREEMENTS

6.1. CALS also seeks to support its argument by referring to comments made by certain members of parliament.[44]

6.2. CALS refers to a set of parliamentary minutes from 16 years ago, where there was apparent "*frustration*" at the inability of Parliament to be involved in the process of negotiating the terms of the treaties that Parliament was asked to approve or reject. CALS draws attention to this to try and argue that Parliament only has a limited role when approving or disapproving treaties.[45]

6.3. However, these apparent cavils by certain parliamentary committee members are not indicative of any general or current view of Parliament (which is not before this Court). It is not appropriate to rely on these isolated views to show "*the flaw in conducting public participation only after signature*".[46]

6.4. The argument by CALS, that Parliament's power to either approve or reject an international agreement is not effective or "*serves no point*",[47] misunderstands the nature of the constitutional power entrusted to Parliament, and the full impact of Parliament's decision not to approve an international agreement.

---

44 CALS's written submissions paras 29 – 31, emphasis added.

45 CALS's written submissions paras 30-31.

46 CALS's written submissions para 30.

47 CALS's written submissions para 29.

6.5. If Parliament refuses to approve an international agreement, this will mean that the agreement cannot bind South Africa. However, it is fallacious to assume that the parliamentary process is all or nothing. Parliament's concerns about a particular treaty can always be conveyed to the treaty making body.

6.6. As the State makes clear on affidavit, particularly in a small regional organisation like SADC, with only 15 member states, South Africa's refusal to ratify an international agreement on the basis that Parliament would not approve the international agreement, may well lead to a situation where other member states may reconsider their position in response.[48] For instance:[49]

6.6.1. a majority of the member states may consider seeking, by subsequent agreement, to amend the international agreement so as to meet the concerns that prevent its ratification (especially if South Africa's refusal to ratify to international agreements prevents the international agreement coming into force).

6.6.2. alternatively, the international agreement may simply be abandoned, and never come into force, if an insufficient number of States are willing to ratify it, and, where necessary, a new international agreement can be negotiated instead.

6.7. The significant impact that a country's decision not to ratify an international

---

[48] State's CAA para 37, Record v12 p 1170-1.

[49] State's CAA para 37, Record v12 p 1171.

agreement after having signed it can have is illustrated factually by the United States (*US*) approach to the Kyoto Protocol to the UN Framework Convention on Climate Change ("the Kyoto Protocol") (an international agreement referred to by CALS):[50]

6.7.1. The Kyoto Protocol, which provides for legally binding emission reduction targets for developed countries, was adopted on 11 December 1997.

6.7.2. The Kyoto Protocol was open for signature from 16 March 1998 to 15 March 1999 (Article 24).

6.7.3. The US, under the Clinton administration, signed the Kyoto Protocol on 12 November 1998.

6.7.4. However, on 27 March 2001 the US announced that it did not intend ratifying the Kyoto Protocol, *inter alia* because the US (now under the Bush administration) believed that all major economies (i.e. including developing countries such as China, India, Brazil and others) should also have emission reduction targets to make the multilateral climate change regime effective and fair.

6.7.5. Since the US was at the time the world's largest emitter of greenhouse gas emissions, this move had a very serious impact on the effectiveness of the Kyoto Protocol and set in motion a diplomatic process that altered the

[50] The facts are set out in the State's CAA para 38, Record v12 p 1171-1173.

multilateral climate change regime over the next decade. The US's confirmation that it would not ratify the Kyoto Protocol, completely changed the negotiating dynamics with regards to targets for the Kyoto Protocol's second commitment period from 2013 to 2020 *inter alia* because other developed countries were not prepared to take on binding commitments without appropriate commitments taken on by the US and "*major economies*".

7. THE EXECUTIVE'S TABLING OF INTERNATIONAL AGREEMENTS BEFORE PARLIAMENT FOR APPROVAL

7.1. CALS now, for the first time, argues that once the President has signed an international agreement it is not open to the executive to take a separate decision whether or not to submit the agreement to Parliament for ratification.[51] This makes no sense and is clearly wrong.

7.2. Section 231(2) creates no obligation on the executive to table an international treaty after signature. Rather what section 231(2) provides, in express terms, is that an "*international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces*".[52] What this means is that if the executive takes a decision that South Africa should become a party to an international agreement (which would require ratification), then the executive must approach Parliament for approval of the

---

51 CALS's written submissions para 32.

52 Section 231(2) reads as follows: "*An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).*"

international agreement. As the full bench pointed out in *ICC Withdrawal case*, "*[t]he binding power comes only once parliament has approved the agreement on behalf of the people of South Africa as their elected representative. It appears that it is a deliberate constitutional scheme that the* ***executive must ordinarily go to parliament (the representative of the people) to get authority*** *to do that which the executive does not already have authority to do.*"[53]

7.3. The constitutional scheme of section 231 is clear. If the executive decides after doing the "*exploratory work*" of negotiating and signing an international agreement that South Africa should become bound by that international agreement, then it does not have the authority to bind the country, it "***must ordinarily go to parliament (the representative of the people) to get authority***".[54] That is what section 231(2) provides for.

7.4. Thus, section 231(2) does not obligate the executive to table an international agreement after signature, rather it creates a constitutional process which must be followed if South Africa is to be bound by an international agreement.

7.5. After the signature of an international agreement, the executive clearly has a decision to make as to whether it believes South Africa should be bound by an international agreement. That this is so, is evident from the following:[55]

7.5.1. When an international agreement requires ratification (as does the 2014

---

53 *ICC Withdrawal* para 55, emphasis added.

54 *ICC Withdrawal* para 55, emphasis added.

55 See generally the State's main submissions para 3.5-3.7, and 3.15-3.22.

Protocol) "***signature does not establish consent to be bound nor does it create an obligation to ratify***",[56] and "***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.***"[57]

7.5.2. Thus, the requirement of ratification allows governments of negotiating states to consider whether they believe that their state should become party to the agreement, and if they do reach this conclusion after deliberation, the fact that the state is only bound on ratification provides the government with the opportunity to comply with domestic obligations, in particular obtaining parliamentary approval.[58]

7.5.3. Therefore, if the executive, on consideration of the negotiated and signed multilateral international agreement, determines that South Africa should not become a party to the international agreement, then it would make no sense to require the executive to still table the agreement before Parliament to seek its approval.

7.5.4. Put simply, if the executive does not believe South Africa should become party to the treaty, then it could hardly be obligated nevertheless to motivate for

---

56 Crawford *Brownlie's Principles of Public International Law* (8th ed, 2012) p 372, emphasis added.

57 Shaw *International Law* (8th ed, 2017) p 690-691, emphasis added.

58 Shaw *International Law* 8th ed (2017) p 691; Aust *Modern Treaty Law and Practice* 3rd ed (2013) p 144.

Parliament to approve the treaty.

7.6. The current facts also provide a useful illustration of the absurd consequences of CALS's argument.

7.7. The executive has made clear that it has not yet made a decision whether South Africa should become a party to the 2014 Protocol.[59]

7.8. While, it has pended that decision until this litigation is completed,[60] if the Court dismisses the challenge to President Zuma's signature, then the executive will have to decide whether South Africa should become a party to the 2014 Protocol which President Zuma signed.

7.9. If the executive on consideration of all the issues (including such arguments as made by the parties in this matter as to why South Africa should not become party to the Protocol) then decides that South Africa should not ratify the Protocol, the question arises, should it nevertheless be forced to approach Parliament for approval of the very Protocol that the executive does not believe the country should become party to? We submit not.

7.10. It is only if the executive decides that South Africa should become a party to the 2014 Protocol that it would then have to approach Parliament, to seek its approval for South Africa to become bound by the Protocol. The State has confirmed that it

---

[59] State's AA, paras 79.4-5, Record v8 p 759.

[60] State's Further AA, para 20.8, Record v10 p 959.

will do so.[61]

7.11. Obviously, if the executive decides that South Africa should not become a party to the Protocol, then there is no reason to assume that the executive would not formally convey that decision to SADC (in the same way as it would, if having decided to approach Parliament for approval, Parliament nevertheless does not approve the Protocol).

7.12. The Court in *Earthlife*, also confirms that the executive has a discretion. In considering whether to entertain a constitutional challenge to the executive's signature of the Russian IGA, the Court explained, that if the main relief, which sought a setting aside of the executive's tabling of the Russian IGA before Parliament under section 231(3), was granted, then "*the effect thereof will be that the agreement will have no binding effect in domestic law.* ***Should the executive then choose to table the agreement before Parliament in terms of s 231(2),*** *a parliamentary/political process will follow in which the agreement will be debated in both the NA and the NCOP with a view to its approval or disapproval by Parliament. It may very well also be the subject of a process of public participation conducted through Parliament.*" [62]

7.13. Thus, the Court held that even though the Minister (with the President's authorisation) had signed the Russian IGA, the executive retained a choice, as to whether to approach Parliament for approval under section 231(2), so that the

---

[61] State's AA, paras 79.4-5 and para 80, Record v8 p 759.

[62] *Earthlife* para 120, emphasis added.

agreement could be made binding. The executive had to "*choose to table the agreement before Parliament in terms of s 231(2)*" if it wanted South Africa to be bound by the agreement; it was not obligated to do so, merely because the agreement had been signed.

7.14. CALS refers to *Earthlife* in support of its argument,[63] but it has misconceived its impact. CALS claims that the Court in Earthlife held that there is a "*jurisdictional requirement that **231(2) treaties** are tabled within a reasonable time*".[64] But this is not correct. The Court found this obligation in respect of section 231**(3)** treaties (and not 231(2) treaties). And, the Court did so precisely because section 231(3), unlike section 231(2), expressly includes this obligation. Section 231(3) specifically provides that a section 231(3) agreement which bind South Africa without approval "*must be tabled in the Assembly and the Council <u>within a reasonable time</u>*." The portion of the *Earthlife* judgment quoted by CALS, relates to situations were agreements become binding without parliamentary approval. The Court makes clear that the reason that section 231(3) expressly requires such agreements to be tabled in a reasonable time, is that otherwise the executive, absent Parliamentary approval, can <u>bind</u> South Africa to the agreement, while keeping Parliament in the dark about the fact that South Africa had been bound by the international agreement.[65]

7.15. The situation in relation to section 231(2) is completely different. Section 231(2)

---

63 CALS's written submissions para 33.

64 CALS's written submissions para 33, emphasis added.

65 Para 126.

includes no obligation on the executive to table the agreement after signature. Section 231(2) agreements do not bind South Africa without parliamentary approval. Rather, as noted above, section 231(2) provides the process by which the executive must approach Parliament if it wants to make an international agreement which is subject to ratification binding. It is for this reason that the Court in *Earthlife*, expressly found, that the executive had a choice whether to table an international agreement that was signed in order to seek Parliamentary approval, under section 231(2).

7.16. If the executive does not want to make such agreement binding on South Africa and has rather decided that South Africa should not ratify and become a party to the agreement, then it, of course, does not need to approach Parliament for approval of the agreement.

GILBERT MARCUS SC
ANDREAS COUTSOUDIS
HEPHZIBAH RAJAH

Chambers, Sandton and Durban

27 August 2018

LIST OF AUTHORITIES REFERRED TO IN THE STATE'S SUPPLEMENTARY SUBMISSIONS

Case Authorities

1 *Earthlife Africa and Another v Minister of Energy and* Others 2017 (5) SA 227 (WCC)
2 *Democratic Alliance v Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP)
3 *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC)
4 *Democratic Alliance v Speaker, National Assembly* 2016 (3) SA 487 (CC)
5 *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC)
6 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)
7 *Harksen v the President* 2000 (2) SA 825 (CC)
8 *Krok and Another v Commissioner, South African Revenue Service* 2015 (6) SA 317 (SCA)
9 *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC)
10 *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421(SCA)
11 *S v Zuma and Others* 1995 (2) SA 642 (CC)
12 *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T)
13 *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA)

International Authorities

14 *Report of the International Law Commission (Fifty-ninth session 2007), General Assembly Official Record, Sixty-second Session Supplement No.10 (A/62/10)*

Academic Authorities

15 Aust, *Modern Treaty Law and Practice* (3rd ed, 2013)

16 Corten and Klein (ed), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford Commentaries on International Law) 2011

17 Crawford, *Brownlie's Principles of Public International Law* (8th ed, 2012)

18 Dugard, *International Law: A South African Perspective* (4th ed, 2011)

19 Shaw *International Law* (8th ed, 2017)