IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO 67/2018

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 OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent

And

SOUTH AFRICAN LITIGATION CENTRE	Amicus Curiae

FILING SHEET

DOCUMENT: (1) THE STATE'S SUPPLEMENTARY WRITTEN SUBMISSIONS IN RESPONSE TO SALC WRITTEN SUBMISSIONS

(2) LIST OF AUTHORITIES

SIGNED at **PRETORIA** on the 02 AUGUST 2018

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO: 67/18

In the matter of:

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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**
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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	**Amicus Curiae**

THE STATE'S SUPPLEMENTARY WRITTEN SUBMISSIONS
IN RESPONSE TO SALC'S WRITTEN SUBMISSIONS

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1. INTRODUCTION

1.1. On 26 July 2018, this Court admitted the Southern African Litigation Centre (*SALC*) as an *amicus*,[1] and granted it leave to file written submissions.[2]

1.2. The State[3] files these supplementary submissions to deal with SALC's written submissions.[4]

1.3. In these submissions, we deal with the arguments raised by SALC in so far as they relate to the constitutionality of President Zuma's signature of the 2014 Protocol. 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 briefly to emphasise certain relevant submissions. Accordingly, these supplementary submissions should be read together with the State's main submissions. We continue to use the abbreviations employed in the main submissions.

1.4. We address the following issues:

1.4.1. SALC's failure to distinguish between what conduct is, and what conduct is not, the subject of the constitutional challenge before this Court and the effects thereof;

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1 Order of the Court dated 26 July 2018.

2 Direction issued by the Chief Justice dated 26 July 2018.

3 The respondents.

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

1.4.2. SALC's new challenge to the procedure adopted by SADC in relation to the 2014 Protocol;

1.4.3. Why the signature of the 2014 Protocol did not violate the right of access to courts; and

1.4.4. Why the High Court's order of costs in favour of SALC should be set aside.

2. THE FAILURE TO DISTINGUISH BETWEEN WHAT IS AND IS NOT BEING CHALLENGED AND THE EFFECTS THEREOF

2.1. In SALC's written submissions it fails to distinguish between the effects of the Summit's suspension of the Tribunal and President Zuma's signature of the 2014 Protocol.

2.2. The nature and importance of this distinction are dealt with extensively in the State's main submissions.[5] In summary:

2.2.1. In May 2011, the Summit, by consensus decision, suspended the Tribunal. That is why the Tribunal continues to be unable to hear and decide any cases. President Zuma's participation in the Summit's suspension of the Tribunal (through his representative) was declared unconstitutional, and the State does not oppose this Court's confirmation of that declaration.

2.2.2. The 2014 Protocol, which President Zuma signed, expressly requires member states to ratify the Protocol to be bound by it, and it provides that the

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[5] State's main submissions paras 1.6 – 1.8, 2.12 – 2.26, and paras 4.2 – 4.10.

2014 Protocol will only enter into force after two-thirds of the member states have deposited instruments of ratification with SADC, after complying with their constitutional obligations. To date, no member state has ratified the 2014 Protocol, and it is accordingly not in force.

2.2.3. The 2014 Protocol expressly provides that it is only if and when it enters into force that it will replace the 2000 Protocol (which currently governs the Tribunal and its jurisdiction) and thus change the Tribunal's jurisdiction so that it can exclusively hear inter-state complaints.

2.3. Therefore, President Zuma's non-binding signature of the 2014 Protocol did not violate any rights, or breach any of South Africa's international obligations.

2.4. Even if President Zuma had not signed the 2014 Protocol, the rights of South African citizens and foreign nationals both domestically and internationally would remain the same as they are currently. This is so because, President Zuma's signature:

2.4.1. did not bind South Africa to the 2014 Protocol (that would require ratification);

2.4.2. did not obligate South Africa to ratify the 2014 Protocol;

2.4.3. did not have any effect on bringing the 2014 Protocol into force (only depositing instruments of ratification can add to the requisite number of ratifications);

2.4.4. did not have any effect on whether the Tribunal's jurisdiction would be changed (it is only if the 2014 Protocol were to come into force, after 10 member states deposit instruments of ratification, that it would change the Tribunal's jurisdiction by replacing the 2000 Protocol, which is currently in force).[6]

2.5. This underscores a fundamental flaw in all of SALC's submissions in so far as they relate to the alleged unconstitutionality of the signature of the 2014 Protocol. The signature neither took away rights, nor did it bind South Africa.

2.6. Once that is so, there is no basis for SALC to submit that mere signature of the 2014 Protocol:

2.6.1. violated section 34 of the Constitution, no matter how that section is interpreted; or

2.6.2. violated any procedural requirements under the SADC Treaty or the 2000 Protocol, no matter how those procedures are interpreted.

2.7. Furthermore, SALC also appears to question the rationality and lawfulness of SADC's and its institutions' procedural actions in drafting, approving and adopting the 2014 Protocol.[7] But the decisions of SADC and its institutions, and any participation by President Zuma and any members of the executive in the decision making of SADC institutions in relation to the 2014 Protocol, are not the

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6 See 2014 Protocol Articles 48 read with Articles 52 and 53.

7 See e.g. SALC's written submissions para 34.

subject of any challenge before this Court. The applicants in the papers before the High Court and this Court challenged only the constitutionality of President Zuma's participation in the suspension of the Summit in 2011 and his signature of the 2014 Protocol in August 2014.[8] It is that conduct, and that conduct alone, which was declared unconstitutional by the High Court and referred to this Court for confirmation.[9]

2.8. Therefore, in terms of section 172(2) of the Constitution, it is only the declarations of constitutional invalidity in respect of President Zuma's participation in the Summit's suspension of the Tribunal in 2011 and his signature of the 2014 Protocol which are before this Court.

3. SADC'S PROCEDURE IN RELATION TO THE 2014 PROTOCOL

3.1. SALC, for the first time in this Court, attempts, in essence, now to argue that it was improper for SADC and its institutions to seek to change the jurisdiction of the Tribunal by adopting a new Protocol subject to ratification by member states. Instead, SALC argues that the process that SADC should have adopted was for the Summit simply to use its power to amend the SADC Treaty (as conferred by Article 36)[10] to summarily change the Tribunal's jurisdiction by majority vote.

3.2. In other words, the approach that SALC advocates as being rational and permissible (and which SALC suggests President Zuma ought to have partaken

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[8] High Court judgment para 1, Record v1 p 14.

[9] High Court orders 1 and 3, Record v1 p 90-91.

[10] The 2000 Protocol mirrors the provisions of the Treaty and provides for amendment by the Summit, under Article 37 of the Protocol.

in) is a process which would have bypassed the need for domestic parliamentary approval and ratification of a new Protocol that would change the Tribunal's jurisdiction.

3.3. Thus, SALC postulates a course of action that would self-evidently be constitutionally objectionable, and would fly in the face of section 231 of the Constitution.

3.4. In particular, SALC argues that:

> "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 *without an extensive signature and ratification process*.**
>
> **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**."[11]

3.5. It is submitted that there are a number of fundamental flaws with SALC's argument which we address thematically.

3.6. ***First***, as noted above, what is at issue in this matter is President Zuma's non-binding signature of the 2014 Protocol, not SADC and its institutions' two-year-long process of drafting, approving and adopting that Protocol. The 2014 Protocol that President Zuma signed was drafted and approved by the Committee of Ministers of Justice, recommended by the Council of Ministers,

[11] SALC's written submissions paras 54 and 55, emphasis added.

and adopted by the Summit.[12]

3.7. Similarly, any actions of President Zuma, and any Ministers, as members of the Summit, the Council of Ministers and the Committee of Ministers of Justice, in the drafting, approval, recommendation and adopting of the 2014 Protocol are not the subject of challenge before this Court.

3.8. ***Second***, the decision to draft and adopt an entirely new Protocol for the Tribunal, which provides that it will only be binding on ratification after compliance with each state's constitutional obligations, is, in fact, the more rigorous and constitutionally compliant process. Indeed, SALC postulates that the Summit should have summarily changed the Tribunal's jurisdiction by vote, using Article 36, because this "*would have alleviated the Summit's stated concerns related to the Tribunal's individual jurisdiction* ***without an extensive signature and ratification process***."[13] Such an expedient, it is submitted, would have been constitutionally subversive.

3.9. Had the 2000 Protocol been amended using Article 36, as SALC proposes, all that would have been required, was a vote by a super majority of the members of the Summit (12 of the 15 heads of state). There would have been no need for the Summit to reach consensus. There would have been no need for each member state to ratify the Protocol in accordance with each state's constitutional procedures (including parliamentary approval). In fact, had the Summit used Article 36, as SALC now proposes, to change the jurisdiction of the Tribunal,

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12 State's AA paras 73- 74, Record v8 p 756-7; Law Society's FA para 14, Record v1, p 169.

13 SALC's written submissions para 54, emphasis added.

even if President Zuma opposed such amendment of the Tribunal's Protocol, he could have been outvoted.

3.10. ***Third***, Article 16(2) of the SADC Treaty makes clear that "*[t]he composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol… adopted by the Summit*", which will form an integral part of the Treaty.[14] Therefore, Article 16(2) evidently would allow the Summit, by consensus decision, to adopt a new Protocol in relation to the Tribunal to replace the current 2000 Protocol, and provide in that new Protocol that it will only enter into force if and when the requisite number of member states have ratified it in accordance with their own constitutional procedures.

3.11. The reason for SADC seeking to adopt a completely new Protocol, which makes specific provision for ratification by members states in accordance with their constitutional procedures, is clear. It ensures greater respect for and fealty to domestic constitutional imperatives. It ensures that member states cannot be bound, and the Tribunal's jurisdiction cannot be changed, without compliance with each country's constitutional obligations (in particular, parliamentary approval, and as required by our Constitution, public participation during that approval process).

3.12. It is no doubt, precisely because SADC adopted this rigorous procedure that

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[14] Originally Article 16(2) provided as follows: "*The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol adopted by the Summit.*" Article 16(2) (as amended) now provides that: "*The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit.*"

gives full and due regard to domestic constitutional obligations, that to date no states have ratified the 2014 Protocol and it accordingly has not entered into force (thus meaning that the 2000 Protocol is still in force).

3.13. Even if there is ambiguity as to the correct procedural approach that SADC should have been adopted, this Court should have regard to the conduct of SADC, its institutions and its member states, in interpreting the Treaty.

3.14. As made clear in the main submissions, since 2012, the procedure adopted by SADC, its member states, and institutions (in particular, the Summit, the Council of Ministers, and the Committee of Ministers of Justice) was to negotiate and adopt a new Protocol for the Tribunal (the 2014 Protocol), which made provision for ratification by each member state after it had complied with its constitutional procedures.[15]

3.15. In *Glenister II* this Court held that, "*[i]n terms of art 31(3)(b) of the Vienna Convention on the Law of Treaties 1969 (1969) 8 ILM 679,* ***the subsequent practice of states in applying a treaty can be used to indicate how the states have interpreted the treaty and thus give content to treaty obligations.***" [16] Article 31 of the Vienna Convention, which deals with interpretation of treaties, forms part of customary international law.[17] And as Dörr

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[15] State's AA paras 73- 74, Record v8 p 756-7.

[16] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (*Glenister II*) (majority judgment) footnote 43, referring to Article 31(3)(b) which provides that "*[t]here shall be taken into account...any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*".

[17] As Shaw *International Law* (8th ed, 2017) p 707 (and footnote 147) points out the International Court of Justice has affirmed on a number of occasions that articles 31 of the Vienna Convention reflect customary international law. See e.g. *Namibia (Advisory Opinion)* 1971 ICJ Rep 16, para 22.

and Schmalenbach in their commentary on the law of treaties, opine, "***[s]ince the parties, acting collectively through their concordant practice, are the masters of their treaty, they cannot only take interpretation further than could a body charged with the role of independent interpretation, but also bring about an implicit treaty amendment by practice***."[18]

3.16. ***Fourth***, SALC's argument in relation to the procedures adopted by SADC is, in any event, irrelevant to the question of whether President Zuma's signature is unconstitutional. South Africa has not ratified the 2014 Protocol and therefore is not bound by the 2014 Protocol. As pointed out in the main submissions, the executive still needs to consider whether South Africa should become party to the Protocol, and if the executive believes that South Africa should become party to the Protocol, the executive would need to table the Protocol before Parliament to seek its approval. One of the issues that would need to be considered when deciding whether South Africa should become a party to and bound by the Protocol, is whether becoming party to the Protocol would violate any of South Africa's international obligations under the SADC Treaty and the 2000 Protocol, this would include a consideration of any argument that the 2014 Protocol would violate any procedural provisions of the SADC Treaty.

3.17. ***Fifth***, this Court is not required to, nor should it, determine whether the Summit, the Council of Ministers, and the Committee of Ministers of Justice, violated any procedural requirements in the SADC Treaty when they drafted, recommended, and adopted the 2014 Protocol. This is so since:

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[18] Dörr & Schmalenbach *Vienna Convention on the Law of Treaties: A commentary* (2012), p 523, emphasis added.

3.17.1. As noted above, the challenge before this Court is to the President's non-binding signature of the 2014 Protocol, not to SADC's, its institutions' and members states' negotiating and adopting of the 2014 Protocol.

3.17.2. SADC, and its institutions, including the Summit, the Council of Ministers and the Committee of Ministers of Justice, are not party to these proceedings, nor are any other member states.

3.17.3. Domestic courts should not sit in judgment over international organisations not based in South Africa, operating under international law, which are not even before this Court, and over which this Court has no jurisdiction.[19] It is for this reason that the SADC Treaty recognises and confers immunity on SADC and its institutions (such as the Summit and the Council of Ministers) before domestic courts.[20]

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[19] It is important to have regard to *Swissborough,* where Joffe J quoted, with approval, the finding by the House of Lords in *Maclaine Watson & Co Ltd v Department of Trade and related appeals; Maclaine Watson & Co Ltd v International Tin Council* [1989] 3 All ER 523 (HL), at 559, that

"The creation and regulation by a number of sovereign States of an international organisation for their common political and economic purposes was an *act jure imperii* and an adjudication of the rights and obligations between themselves and that organisation or inter se, can be undertaken only on the plane of international law. The transactions here concerned (the participation and concurrence in the proceedings of the council authorising or countenancing the act of the buffer stock manager) were **transactions of sovereign States with and within the international organisation which they have created and are not to be subjected to the processes of our courts** in order to determine what liabilities arising out of them attached to the members in favour of the ITC."[19]

Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T) p 329, emphasis added.

And, in *Van Zyl v Government of the Republic of South Africa*, the SCA, relying on *Swissborough*, held that "*[c]ourts should act with restraint when dealing with allegations of unlawful conduct ascribed to sovereign states*". *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) para 2.

[20] See the SADC Treaty Article 31(1). For a discussion of the position in customary international law, see Shaw *International Law* p 955-963 who refers *inter alia* to the decision of *ZM v Permanent Delegation of the League of Arab States to the United Nations* (1993) 116 ILR 643 (at 647) where the Swiss Labour Court held that "*customary international law recognised that international organisations,*

3.17.4. In any event, the obligations owed under the Treaty, are owed to the other member states.[21] It is those member states that by agreement, and through consensus decision making in the various SADC institutions, negotiated and drafted the 2014 Protocol, and in 2014 ultimately adopted that Protocol. The process was not a unilateral action by any one member state, but a multilateral action by all of them. It, therefore, could not be the case that the process followed could violate obligations owed to the other member states, since they all participated in, and agreed to, that process.

4. THE SIGNATURE OF THE PROTOCOL DOES NOT VIOLATE THE RIGHT OF ACCESS TO COURTS

4.1. Section 231(1) of the Constitution allows the executive to do the exploratory work of negotiating and signing an international agreement.[22] However, section 231(2) requires Parliament to approve an international agreement for it to be made binding on South Africa (by ratification).

4.2. The constitutional structure of section 231 exists precisely because the signature of an international agreement that is subject to ratification can neither take away or create rights domestically nor bind South Africa internationally.[23]

4.3. Therefore, as submitted in the main submissions, President Zuma's signature of

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whether universal or regional, enjoy absolute immunity… This privilege of international organisations arises from the purpose and functions assigned to them. They can only carry out their tasks if they are beyond the censure of the courts of member states or their headquarters."

21 Crawford, *Brownlie's Principles of Public International Law* (8th ed, 2012) p 384.

22 *Democratic Alliance v Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP) (*ICC Withdrawal*) para 55.

23 *ICC Withdrawal* para 47.

the 2014 Protocol did not violate section 34 of the Constitution.[24]

4.4. Nevertheless, SALC seeks to rely on regional and international law frameworks to try to argue that section 34 should be interpreted to create a domestic constitutional right of individuals to access the Tribunal, which was allegedly violated by the signature of the 2014 Protocol.

4.5. It is submitted that SALC's argument has a number of fundamental flaws.

4.6. ***First***, SALC's argument fails to deal with the fact that South Africa has not ratified the 2014 Protocol. Therefore, the mere signature of the 2014 Protocol cannot violate any domestic rights, since it does not bind South Africa to the Protocol, nor does it bring the Protocol into force. The signature has no legal effect on the jurisdiction of the Tribunal.

4.7. Individuals cannot access the Tribunal because the Summit suspended the Tribunal in 2011.

4.8. ***Second***, the right of access to courts protected by section 34, in accordance with international human rights law, is a right to access domestic courts in South Africa. It is not an extraterritorial right to access international tribunals.[25]

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[24] State's main submissions para 4.48.

[25] See *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others* (Communication 409/12) (*Tembani* decision), para 139-145, Record v11 p 1032-34 and see *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 44. In the *Tembani decision* the African Commission emphasised that its view was supported by the European Court of Human Rights, which also held that the right of access to courts and to an effective remedy guaranteed in the European Convention on Human Rights was a right of access to national courts.

4.9. SALC fails to deal with the fact that even though international law recognises a right of access to courts, this is generally understood as a right to access domestic courts. The African Commission's interpretation of the right of access to courts in the African Charter on Human and Peoples Rights (*the African Charter*) (to which South Africa is a party) bears this out. In its written submissions, SALC refers to the African Commission and the regional system created by the African Charter.[26] However, there are two important issues of particular relevance to the present matter:

4.9.1. First, the African Commission, tasked with the interpretation of the African Charter, has held that Article 7 (which deals with the right of access to courts) and Article 26 (which deals with the need to protect the independence of courts) do not protect or guarantee access to the SADC Tribunal.[27] The African Commission held that the right of access to courts, and the duty to guarantee their independence, protected by Articles 7 and 26, is a right to access national courts, not international tribunals.[28] The African Commission made these findings in the *Tembani* matter in which two of the Zimbabwean

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The African Commission relied in this regard on the cases of *Maksimov v Russia* (2010) ECtHR (Application No. 43233/02) and *Golha v The Czech Republic* (2011) ECtHR (Application No. 7051/06) para 71. Similarly, there is clearly no customary international law right of individuals to access international courts (see F Francioni, "Access of Individuals to International Tribunals and International Human Rights Complaints Procedures", in F Francioni, *Access to Justice as a Human Right* (2007) p 58).

26 SALC's written submissions paras 76 and 97.

27 *Tembani* decision para 139-145, Record v11 p 1032-34.

28 *Tembani* decision para 139-145, Record v11 p 1032-34. The African Commission held at para 144 (Record v11 p1034), inter alia, that: "*The Commission agrees with the Complainant that Article 26 of the Charter should be read together with Article 7 of the Charter. In that regard, the Commission takes the view that reference to 'the Courts' in Article 26 of the Charter cannot be reference to an international court but is akin and related to the national judicial organs mentioned in Article 7 of the Charter. The Commission notes that its established jurisprudence on the meaning and implications of Article 26 of the Charter apply to the national courts which exercise compulsory jurisdiction over individuals who have no possibility of opting out of the coverage of the judicial authority of those courts. Accordingly, the Commission does not find any Charter obligation on the Respondent States to guarantee the independence, competence and institutional integrity of the SADC Tribunal.*"

applicants in this current matter had sought to challenge the suspension of the SADC Tribunal by the Summit on the basis that this was unlawful and violated rights in the African Charter (which decision forms part of the record in this matter).[29] The African Commission dismissed the complaint.

4.9.2. Second, while SALC uses the African Commission as an example of a tribunal that can hear individual complaints, it fails to draw attention to the fact that the African Commission does not have the status or powers of an international court. While there is some academic debate as to the status of the African Commission's decisions, they are not generally considered to be binding and directly enforceable, but rather they are usually understood to be recommendatory and of "*persuasive authority (political and moral)*".[30] In the African Charter system, it is the African Court on Human and People's Rights (*the African Court*) that has jurisdiction to make binding decisions. However, as pointed out in the main submissions, the African Court only has jurisdiction to hear individual complaints if the state parties have specifically given consent for the African Court to exercise jurisdiction over such individual complaints.[31] Currently, only eight states have given consent (by depositing declarations under Article 38(6) of the Protocol establishing the African Court) to give the Court jurisdiction over complaints lodged by

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[29] State's Further AA para 35, Record v10 p 968, and Annexure KEM3, Record v10 p 987ff.

[30] See M Evans and R Murray *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2nd ed, 2008) p 36, where it is noted that the African Commission's "*decisions do not formally have the binding legal force of a ruling of a court of law, but have a persuasive authority (political and moral) akin to the opinions of the UN Human Rights Committee and other similar UN bodies.*"

[31] Articles 5(3) and 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

individuals.[32] Although South Africa has ratified the Protocol of the African Court, it has not deposited a declaration under Article 38(6) giving the Court jurisdiction to hear complaints by individuals.[33]

4.10. Furthermore, when considering the proper interpretation of section 34 of the Constitution, this Court must have regard to the foundational principles of the Constitution.[34] This includes the principle of constitutional supremacy.[35] All domestic courts are subject to and bound by the Constitution. International courts and tribunals are not.[36] International courts can therefore make binding findings at odds with the Constitution and the decisions of this Court. This has the potential to undermine constitutional supremacy.

4.11. Therefore, section 34 of the Constitution should not be interpreted to guarantee a right of access to international courts, which have the potential to undermine

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32 See the details on the African Court's website: http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court.

33 Ibid.

34 See *Matatiele Municipality & Others v President of the Republic of South Africa & Others* (No 2) 2007 (6) SA 477 (CC) para 36, where Ngcobo J held that *"[o]ur Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it 'has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.' Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole."*

35 Section 1(c) of the Constitution.

36 It is a fundamental principle of international law, and international adjudication, that international law takes precedence to, and prevails over, domestic law (including any domestic constitution, or its interpretation by domestic courts). Shaw in explaining this principle points out that "*[i]n the Polish Nationals in Danzig case, the [Permanent Court of International Justice] declared that* ***'a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force'****. The International Court, in the Applicability of the Obligation to Arbitrate case, has underlined* ***'the fundamental principle of international law that international law prevails over domestic law'*** ". Shaw *International Law* p 101 (emphasis added), referring to the decisions of *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory, Advisory Opinion* 1932 PCIJ (ser. A/B) No. 44 p 24 and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, 1988 ICJ 12 p 34.

the very constitutional supremacy that our Constitution enshrines.

4.12. ***Third***, the mere fact that certain other regional or international organisations have (by agreement between their member states) chosen to create tribunals or institutions which allow direct complaints by individuals, does not mean that the SADC Tribunal is required to have such jurisdiction.

4.13. Indeed, for over a decade after SADC came into existence it had no operational Tribunal,[37] and its jurisdiction to hear individual complaints was only provided for and established by the 2000 Protocol.

4.14. International law is based on the principle of consent by states.[38] This is especially true in relation to the creation of international tribunals, which exercise jurisdiction over independent and sovereign states: "***a state can be made subject to the jurisdiction of an international court or tribunal only if it consents***".[39] It is therefore perfectly permissible for states to choose whether, and to what extent, to create international tribunals that have jurisdiction over them, or by agreement to change the jurisdiction of tribunals they have created.

4.15. In the State's main submissions, we drew attention to the judicial organ of the most well-known international organisation, and the one with the largest membership: the United Nations. Its principle judicial organ, the International

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37 State's AA para 93.1, Record v8 p 764.

38 Dugard *International Law: A South African Perspective (4th ed, 2011)* p 24-25.

39 See Aust *Modern Treaty Law and Practice* (3rd ed, 2013) p 256, emphasis added.

Court of Justice, only has jurisdiction to deal with complaints between states.[40] This is the jurisdiction that the 2014 Protocol, if it comes into force, will give the SADC Tribunal.

5. SALC'S COSTS IN THE HIGH COURT

5.1. This Court has held that an *amicus* "*is neither a loser nor a winner and is generally not entitled to be awarded costs.*"[41]

5.2. SALC does not dispute this binding proposition.[42] It therefore accepts that it would only be in certain exceptional circumstances that a court would be entitled to award costs to an *amicus*.[43]

5.3. SALC does not submit that in this matter there are any exceptional circumstances that would entitle it to costs. Nor, does SALC submit that the High Court found there to be any exceptional circumstances.

5.4. Rather, SALC admits that it did not seek costs in the High Court.[44] Not only were costs not sought, but the High Court was never addressed by any of the parties or *amici* (SALC and CALS) on the question of costs being awarded to the *amici*. Nowhere in the judgment does the High Court explain why it awarded costs to the *amici*. It simply included a cost award in favour of the *amici* in its order.

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[40] The UN Charter, Articles 92 and 93, and the Statute of the ICJ, Article 34(1).

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

[42] SALC's written submissions para 119.

[43] SALC's written submissions para 119.

[44] SALC's written submissions para 114.

5.5. Thus, the High Court gave no reasons as to why the usual approach to costs (that *amici* are not entitled to costs), in accordance with this Court's binding jurisprudence, was not followed. Therefore, we submit that the High Court's awarding of costs to the *amici* was not justified, and appears to be predicated on an incorrect appreciation of the principle of costs in relation to *amici.*

5.6. In the circumstances, it is appropriate for this Court to set aside the High Court's ordering of costs in favour of the *amici.*[45]

5.7. There was no justification of the awarding of costs to the *amici* in this matter. Therefore, this Court should not allow the High Court's costs order in respect of the *amici* to stand.

GILBERT MARCUS SC
ANDREAS COUTSOUDIS
HEPHZIBAH RAJAH

Chambers, Sandton and Durban

10 August 2018

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[45] *Biowatch Trust* para 29.

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

Case Authorities

1 *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (6) 232 (CC)
2 *Democratic Alliance v Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP)
3 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)
4 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC)
5 *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC)
6 *Matatiele Municipality & Others v President of the Republic of South Africa & Others (No 2)* 2007 (6) SA 477 (CC)
7 *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T)
8 *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA)

Foreign and International Authorities

9 *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* 1988 ICJ Reports 12
10 *Golha v The Czech Republic* (2011) ECtHR (Application No. 7051/06)
11 *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others* (Communication 409/12)
12 *Maclaine Watson & Co Ltd v International Tin Council* [1989] 3 All ER [HL]
13 *Maksimov v Russia* (2010) ECtHR (Application No. 43233/02)
14 *Namibia (Advisory Opinion)* 1971 ICJ Rep 16
15 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory* 1932 PCIJ (ser. A/B) No. 44 p 24

16 *ZM v Permanent Delegation of the League of Arab States to the United Nations* (1993) 116 ILR 643

Academic Authorities

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

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19 Dörr & Schmalenbach, *Vienna Convention on the Law of Treaties: A commentary* (2012)

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22 Francioni, *Access to Justice as a Human Right* (2007)

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