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**

THE STATE'S WRITTEN SUBMISSIONS

Table of Contents

1. INTRODUCTION AND SYNOPSIS

1.1. This is an application to confirm the High Court's declarations of constitutional invalidity in relation to two distinct actions with very different legal effects:

1.1.1. First, President Zuma's participation in 2011 in the SADC Summit's[1] suspension of the SADC Tribunal (*the Tribunal*)[2]; and

1.1.2. Second, President Zuma's non-binding signature of the SADC Tribunal Protocol in 2014 (*the 2014 Protocol*).[3]

1.2. The central issue in the litigation concerns a change envisaged by the 2014 Protocol. That change, if accepted, would alter the jurisdiction of the Tribunal from one in which it would entertain disputes between citizens and their governments, to one in which it would only hear disputes between states.

1.3. The State[4] does not oppose the confirmation of the order declaring President Zuma's participation in the suspension of the Tribunal unconstitutional.

1.4. The State only appeals against the declaration of invalidity of President Zuma's

---

1 The Summit of the Heads of State or Government (*the Summit*) of the Southern African Development Community (*SADC*) established by Article 9 of the Treaty of the Southern African Development Community, 1992 (*the SADC Treaty*).

2 The Tribunal is governed by the Protocol of the Tribunal in SADC, 2000 (*the 2000 Protocol*).

3 The Protocol on the Tribunal in SADC, 2014.

4 The President, the Minister of Justice, and the Minister of International Relations and Cooperation.

signature of the 2014 Protocol.[5]

1.5. The High Court's declaration of invalidity in relation to President Zuma's signature is predicated on a series of misunderstandings and misconstructions of fundamental constitutional and international law principles. If these misunderstandings and misconstructions are allowed to stand it would potentially damage the constitutionally mandated separation of powers in relation to the entering into of international agreements.

1.6. In this regard, the following key points need to be stressed:

1.6.1. 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.

1.6.2. President Zuma's participation in the Summit's suspension of the Tribunal was separately declared to be unconstitutional. The State does not oppose the confirmation of that declaration.

1.6.3. Article 16 of the SADC Treaty leaves all issues of how the Tribunal will function to be determined by a Protocol adopted by the Summit. The Tribunal's jurisdiction is currently governed by the 2000 Protocol which is still in force (which grants the Tribunal the jurisdiction to consider matters brought by individuals and member states).

---

[5] In terms of section 172(2)(d) of the Constitution, read with Rule 16(2) of the Constitutional Court Rules, the State is entitled to appeal against the confirmation of an order declaring the President's conduct constitutionally invalid.

1.6.4. The 2014 Protocol, which President Zuma signed, expressly requires member states to ratify the Protocol in order to be bound by it, and it provides that the 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 own constitutional obligations. To date no state has ratified the 2014 Protocol.

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

1.6.6. Therefore, President Zuma's signature did not bind South Africa to the 2014 Protocol (only ratification would do that) and it had no effect on whether the Protocol will ever enter into force (only the depositing of instruments of ratification can bring the Protocol into force). In short, President Zuma's signature had no legal effect on the jurisdiction of the Tribunal.

1.6.7. President Zuma's signature of the 2014 Protocol, as with all signatures of international agreements which are subject to ratification, allows the executive to then consider whether South Africa should become a party to the Protocol (which would require ratification). The signature does not obligate South Africa to ratify the Protocol.

1.6.8. As section 231 of the Constitution requires, and as the State accepts on

affidavit, even if the executive were to decide that South Africa should become a party to (and bound by) the 2014 Protocol, the executive would then still need to table the Protocol before Parliament to seek approval of the Protocol so that it can be ratified.

1.6.9. If Parliament, after complying with its constitutional obligations (including facilitating public participation) does not approve the 2014 Protocol, then South Africa cannot ratify the Protocol.

1.6.10. If Parliament were to approve the 2014 Protocol, the executive would only then deposit an instrument of ratification on behalf of South Africa with SADC.

1.6.11. It is only if South Africa ratifies the Protocol, which requires the depositing of an instrument of ratification with SADC, that (a) South Africa will be bound by the Protocol and (b) that it will add to the necessary tally of 10 ratifications to bring the Protocol into force.

1.7. Once these points are understood, it is clear that President Zuma's signature was not irrational or otherwise unconstitutional. Moreover, the challenge to the signature of the 2014 Protocol is evidently premature and should have been dismissed.

1.8. It appears that the High Court only declared President Zuma's signature to be unconstitutional because it confused, or failed to properly distinguish between,

the effects of the suspension of the Tribunal and the effects of President Zuma's signature of the 2014 Protocol.

1.9. The applicants (who we refer to as *the Law Society*[6] and *the Zimbabwean applicants*,[7] respectively) similarly conflate the distinction between, and the different legal effects of, the Summit's suspension of the Tribunal and President Zuma's (non-binding) signature of the 2014 Protocol.

1.10. In these submissions:

1.10.1. We begin by summarising the central facts;

1.10.2. We outline the applicable legal principles; and

1.10.3. We then thematically address why the declaration of invalidity in respect of the signature of the 2014 Protocol should not be confirmed.

2. A SUMMARY OF THE CENTRAL FACTS[8]

2.1. SADC is an international organisation. It was established on 17 August 1992 in terms of the SADC Treaty and has fifteen member states, including South Africa.[9]

---

6 The first applicant.
7 The second to seventh applicants, who are Zimbabwean citizens and companies that intervened in the Law Society's application.
8 In approaching the facts, the Court must apply the trite principles in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) in relation to the resolution of factual disputes.
9 Law Society's Founding Affidavit (*FA*) para 22, Record v2 p 165.

2.2. The advancement of stability and sustainable development in the SADC region are important foreign policy objectives for South Africa, which it seeks to advance through its involvement in SADC, and by working to ensure increased political and economic integration of SADC.[10]

2.3. In view of the colonial history of the SADC region, the principle of sovereignty, irrespective of the economic size of a particular SADC member state, is a core consideration for all SADC member states.[11]

2.4. SADC has a number of institutions, including, the Summit of Heads of State or Government (*the Summit*),[12]the Council of Ministers (generally consisting of foreign ministers of member states),[13] and the sectoral and cluster ministerial committees (which consist of ministers from each member states who oversee the activities of core areas), including the Committee of Ministers of Justice and Attorneys General (*the Committee of Ministers of Justice*).[14]

2.5. The Summit is "*the supreme policy-making institution of SADC*" [15] and is "*responsible for the **overall policy** direction and **control of the functions** of SADC*".[16]

2.6. Unless the SADC Treaty otherwise provides, "*the decisions of the Summit shall*

---

[10] State's Answering Affidavit (*AA*) para 5, Record v8 p 732.
[11] State's AA para 7, Record v8 p 732-3.
[12] Articles 9(1)(a) and 10(1) of the SADC Treaty.
[13] Article 9(1)(c) and 11 of the SADC Treaty.
[14] Article 9(1)(d) and 12 (2)(vi) of the SADC Treaty.
[15] Article 10(1) of the SADC Treaty.
[16] Article 10(2) of the SADC Treaty (emphasis added).

*be **taken by consensus** and **shall be binding**.*"[17]

2.7. The President, as the head of state of South Africa, is a member of the Summit.

2.8. The Summit is given the power to dissolve any SADC institution (which includes the Tribunal[18]), and SADC itself.[19]

2.9. The Tribunal is provided for in the Treaty, but its jurisdiction and other functions are not. Article 16(2) of the Treaty provides in relevant part that "*the composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol*" which is to be adopted by the Summit, and which Protocol will then form an integral part of Treaty. The current Protocol governing the Tribunal is the 2000 Protocol.

2.10. The Summit also has the power to amend the SADC Treaty.[20] In fact, as recognised by this Court,[21] the Tribunal was only brought into existence by a decision by the Summit. The Summit took a decision in 2002 to bring the 2000 Protocol (which currently provides for the functioning and jurisdiction of the Tribunal) into operation by amending the SADC Treaty and the 2000 Protocol. This is because there had been insufficient ratification to bring the 2000 Protocol into force, so the ratification requirement in the 2000 Protocol was removed in

---

17 Article 10(9) of the SADC Treaty.
18 Article 9(g) of the SADC Treaty.
19 Article 35 of the SADC Treaty.
20 Article 36(1) of the SADC Treaty.
21 *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) (*Fick*) para 9.

terms of the Summit amendment.[22]

2.11. The Tribunal only became operational in November 2005 after its first members were appointed.[23] It only received its first case in 2007. It therefore only heard cases for a brief period of approximately four years, until its suspension in May 2011.[24] During this time, it only decided approximately nineteen cases.[25]

2.12. In May 2011, the Summit decided, by consensus, to suspend the Tribunal (after putting in place a temporary moratorium, in August 2010, on it hearing new cases).[26] The Summit put in place a "*moratorium on receiving any new cases or hearings of any cases by the Tribunal*".[27] In addition, since the Tribunal was suspended, the Summit decided not to reappoint members to the Tribunal whose term of office would be expiring.[28]

2.13. President Zuma did not attend the Summit meeting, but the South African High Commissioner to Namibia represented him.[29]

2.14. At the 2012 Summit meeting, the Summit (acting within its powers) decided that a new Protocol should be negotiated for the Tribunal, which would limit its jurisdiction to hearing inter-state complaints (complaints brought by states), and

---

[22] DIRCO's Table of SADC Protocol, Record v12 p 1195, item 26, Protocol on the Tribunal, which indicates that the Agreement amending the Protocol on the Tribunal 2002 provided that the 2000 Protocol was amended to enter into force upon the adoption of the Agreement Amending the Treaty of the SADC on 14 August 2001 and *Fick* paras 9 and 10 and *Government of the Republic of Zimbabwe v Fick & others* (657/11) [2012] ZASCA 122 paras 35 and 36.
[23] State's AA para 93.1, Record v8 p 764.
[24] State's AA para 93.1, Record v8 p 764.
[25] State's AA para 93.1, Record v8 p 764.
[26] State's AA para 21, Record v8 p 738.
[27] State's AA para 17, Record v8 p 736-7.
[28] State's AA para 17, Record v8 p 736-7.
[29] State's AA para 20, Record v8 p 738.

not complaints from individuals.[30]

2.15. Thus began an extensive process of negotiation within SADC and its various institutions to prepare and adopt a new Protocol for the Tribunal, which provided for a more limited mandate for the Tribunal (given the concerns raised by the Council of Ministers and the Summit that the Tribunal's mandate was too broad).[31]

2.16. In 2014, this process culminated in a final draft being approved and recommended by the Committee of Ministers of Justice to the Council of Ministers and the Summit for their consideration.[32] In August 2014 the Council of Ministers considered and approved the new Protocol (approved by the Committee of Ministers of Justice), and recommended to the Summit that it adopt the new Protocol.[33]

2.17. Accordingly, at the August 2014 Summit meeting, on the recommendation of the Council of Ministers, the Summit adopted the 2014 Protocol, which limited the jurisdiction of the Tribunal to deal with inter-state complaints.[34]

2.18. The 2014 Protocol, which was adopted by the Summit, did not simply represent any one state's view as to the proposed role and jurisdiction of the Tribunal, but rather represented the consensus in SADC and its institutions, after much

---

30 State's AA para 72, Record v8 p 756.
31 State's AA para 73, Record v8 p 756-7.
32 State's AA para 73, Record v8 p 756-7; Law Society's FA para 14, Record v1, p 169.
33 State's AA para 74, Record v8 p 756-7.
34 State's AA para 74, Record v8 p 757; Law Society's FA para 14, Record v1, p 169.

negotiation and consideration.[35]

2.19. However, importantly, the SADC member states and institutions, specifically drafted and adopted a Protocol that (a) would only bind a member state upon ratification, which ratification has to be in accordance with each member state's own constitutional procedures and (b) would only enter into force once the requisite number of ratifications had been deposited. The 2014 Protocol expressly provided that:

2.19.1. It required ratification to become binding, not a mere signature (which was simply a formality),[36]

2.19.2. It would only enter into force, if and when two-thirds of the member states (10 of the 15 member states) had ratified the Protocol, "*in accordance with their constitutional procedures*", by depositing instruments of ratification with SADC;[37] and

2.19.3. It would only replace the 2000 Protocol once it came into force.[38]

2.20. In other words, the 2014 Protocol that was negotiated, and which President Zuma signed, does not summarily change the jurisdiction of the Tribunal. Rather it intentionally and explicitly ensures that such a change could only occur if a super-majority of member states ratify the protocol after compliance with their

---

[35] State's AA para 77, Record v8 p 758.
[36] Article 52 provides that "*This Protocol shall be ratified by Member States who have signed the Protocol* ***in accordance with their constitutional procedures*****."**
[37] Articles 53 and 55.
[38] Article 48.

own constitutional procedures. In countries like South Africa, this would require first obtaining parliamentary approval (which would include public participation).

2.21. The reason that the Tribunal cannot presently deal with any cases is that it has been suspended by the Summit. The position is unaffected legally or factually by the 2014 Protocol. The 2014 Protocol is not in force.[39]

2.22. President Zuma signed the 2014 Protocol in the knowledge that after signature he would have an opportunity, together with the executive, to consider whether South Africa should seek to ratify the 2014 Protocol. If the executive wished to ratify the Protocol this would require the executive to table the 2014 Protocol before both houses of Parliament for their approval.[40]

2.23. Thus, President Zuma signed a Protocol which clearly ensured that South Africa's constitutional requirements (including parliamentary approval, and the concomitant public participation process that this requires) would be fully respected before any change could be wrought to South Africa's international rights and obligations.

2.24. The 2014 Protocol has not come into operation, nor did President Zuma's signature have any effect on whether it will ever come into operation (that would require ratification by 10 member states, which may or may not include South Africa). Thus, President Zuma's signature cannot be said to affect any rights or interests of any of the parties.

---

[39] State's Answering Affidavit in response to the Zimbabwe Applicants' Founding Affidavit (*State's Further AA*) para 20.7, Record v10 p 958.

[40] State's AA para 79.4, Record v8 p 759.

2.25. At the time this case was launched, the State made it clear that (a) it had not reached a decision as to whether it believed South Africa should ratify the 2014 Protocol, and (b) if the State decided that South Africa should ratify the 2014 Protocol it would need to obtain the approval of Parliament (which would include public participation), which approval may or may not be given. [41]

2.26. The State indicated that, rather than pre-empting this litigation and findings made by the courts, it would await the outcome before taking a final decision as to whether it believes South Africa should ratify the 2014 Protocol or not (which would then require the State to table the Protocol before Parliament to seek approval).[42]

3. THE APPLICABLE LEGAL PRINCIPLES

Section 231 and the entering into of international agreements

3.1. At the heart of this case is section 231 of the Constitution. The section prescribes how South Africa enters into and becomes bound by international agreements, and how those international agreements are domesticated.

3.2. Section 231 is "*deeply rooted in the separation of powers*".[43] It creates a careful balance of powers and responsibilities between the legislature and the executive. That careful constitutionally-ordained separation is vital to properly

---

41 State's AA, para 79.5, Record v8 p 759.

42 State's FA, para 20.8, Record v10 p 959. This approach was perfectly permissible, see *Saamwerk Southwerke (Pty) Ltd v Minister of Mineral Resources and Another* [2017] ZASCA 56 (19 May 2017) para 66.

43 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (*Glenister II)* para 89.

consider the issues before this Court.

3.3. ***First***, section 231(1) makes "*[t]he negotiating and signature of international agreements… the responsibility of the national executive*". In doing so, it only gives the national executive a limited power to undertake the "*exploratory work*" of negotiating and signing international agreements, but this does not bind South Africa to such international agreements.[44]

3.4. As was held by a full bench of the North Gauteng High Court in the *ICC Withdrawal* case, the executive's signature of an international agreement "*has no direct legal consequences*".[45]

3.5. ***Second***, section 231 makes clear that there is a delineation of functions between the executive and legislature in relation to binding South Africa to international agreements. In particular, if after negotiating and signing an international agreement, the executive wishes South Africa to agree to be bound by an international agreement, the executive must first table the international agreement before both houses of Parliament for their consideration and approval (section 231(2)). As is made clear in the *ICC Withdrawal* case "*the executive does not have the power to bind South Africa to [an international] agreement.* ***The 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***

---

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

[45] *ICC Withdrawal* para 47 (emphasis added).

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."[46]

3.6. As Ngcobo CJ held in *Glenister II*, "*[u]nder our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement* ***do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic***."[47]

3.7. ***Third***, since the Constitution obligates both houses of Parliament to facilitate public participation in its legislative and other activities,[48] the Constitution expressly envisages that Parliament would be obligated (subject to limited exceptions) to conduct appropriate public participation processes when considering whether to approve an international agreement.[49]

3.8. ***Fourth***, if and when both houses of Parliament approve an international agreement, as required by section 231(2), then South Africa can be bound to the agreement as a matter of international law.[50] Practically this then requires the executive (normally the Minister of International Relations) formally to give notice that South Africa agrees to be bound by the international agreement. This occurs by depositing an instrument of ratification with the relevant body designated in the international agreement.[51] The 2014 Protocol provides that "*all Instruments*

---

46 *ICC Withdrawal* para 55.
47 *Glenister II*, para 95.
48 Sections 57(1)(b) and 72(1)(a) of the Constitution.
49 *Earthlife Africa* para 114.
50 *Glenister II* para 181.
51 *ICC Withdrawal* case para 51. Similarly, international agreements, in addition to allowing for ratification,

of Ratification and Accession shall be deposited with the Executive Secretary of SADC who shall transmit certified copies to all Member States."[52]

3.9. ***Fifth***, there is only one limited exception to the need for the executive to seek parliamentary approval. Section 231(3) permits the executive to bind South Africa to a very limited subset of international agreements "*without parliamentary approval or the public participation that often accompanies any such parliamentary approval process,* ***by tabling the agreement within a reasonable time***."[53] But the agreements that can be tabled under 231(3) are "***a limited subset of run of the mill agreements*** *(or as Professor Dugard puts it,* ***agreements 'of a routine nature, flowing from daily activities of government departments')*** *which* ***would not generally engage or warrant the focussed attention or interest of Parliament***."[54]

3.10. The Court in *ICC Withdrawal* accepted that where an international agreement requires ratification, then it must be tabled under section 231(2) (and not section 231(3)), since the Court held that "*ratification... requires prior parliamentary approval in terms of s 231(2*)."[55]

3.11. ***Sixth***, even when the executive is entitled to make use of section 231(3) to bind South Africa absent parliamentary approval, the section does not allow it to completely dispense with Parliament. Rather, if the executive wishes to make an

---

may also allow for accession. This is the process of formally agreeing to be bound by a treaty (by depositing an instrument of accession) to which a state had not been party to the negotiation of and therefore had not signed. See Dugard *International Law: A South Africa Perspective* (4th ed) p 416.

52 Article 55(1).

53 *Earthlife Africa* para 114 (emphasis added)

54 *Earthlife Africa* para 114 (emphasis added)

55 *ICC Withdrawal* para 47, referring to Dugard *International Law* p 417.

international agreement that falls within section 231(3) binding on South Africa it must still table the international agreement before Parliament within a reasonable time.[56] The tabling before Parliament is a jurisdictional requirement for the executive to exercise the power under section 231(3).[57] There are sound practical and principled reasons for this. In accordance with the separation of powers, the tabling allows Parliament to scrutinise the relevant agreement to ensure that the executive has not mischaracterised an international agreement, in order to bypass the section 231(2) approval process. This gives due regard to the constitutional principles of openness and accountability.[58]

3.12. ***Seventh***, sections 231(2) and (3) only deal with the domestic constitutional obligations (for instance, the need for parliamentary approval) that must be complied with in order for international agreements to be made binding on South Africa on the international plane. These subsections do not then mean that international agreements create domestic rights or obligations merely because they bind South Africa on the international plane. Section 231(4) makes clear that to create domestic rights and obligations, an international agreement must be enacted domestically by the passing of legislation by Parliament.[59] As the Court held in the *ICC Withdrawal* case, "*once parliament approves the agreement, internationally the country becomes bound by that agreement.*

---

[56] Section 231(3), and *Earthlife Africa* para 126.
[57] *Earthlife Africa* para 126.
[58] *Earthlife Africa* para 126, referring to section 41 of the Constitution.
[59] See *Glenister II* para 181. The only exception to the need for Parliament to pass domestic legislation to create domestic rights, is section 231(4) which indicates that "self-executing" provisions of international agreements that have been:
(a) approved by Parliament, and
(b) do not violate the Constitution or any legislation
will have domestic effect without domestic legislation. For the debate and uncertainty in relation to what would amount to a "*self-executing*" provision, see Dugard *International Law* p 56 – 60.

Domestically, the process is completed by parliament enacting such international agreement as national law in terms of s 231(4)."[60]

3.13. By way of practical example, the stages and decisions that must be taken before South Africa is bound by a treaty are well demonstrated by an instrument of ratification deposited by South Africa in relation to another SADC protocol, the Protocol on Culture, Information and Sport.[61]

3.14. This Instrument[62] makes clear that the Protocol was signed on behalf of the government on the day it was adopted. But since the Protocol provided for ratification, the government, after signature needed to consider whether South Africa wished to become party to the Protocol. Having thereafter decided that South Africa should become party to the Protocol, the government sought and

---

[60] *ICC Withdrawal* para 35.

[61] Record v12 p 1199, Instrument of Ratification. See another example in relation to the Protocol on Finance and Investment at v12 p 1200.

[62] Record v12 p 1199, the Instrument of Ratification provides:

"WHEREAS the Southern African Development Community (SADC) Protocol on Culture, Information and Sport (hereinafter referred to as "the Protocol") was adopted at Blantyre, Malawi on 14 August 2001;

AND WHEREAS the Protocol was signed on behalf of the Government of the Republic of South Africa on 14 August 2001;

AND WHEREAS Article 38 of the Protocol provides for ratification thereof;

AND WHEREAS the Government of the Republic of South Africa desires to become a Party to the Protocol;

AND WHEREAS ratification of the Protocol was approved by the South African Parliament in accordance with the requirements of South African law;

NOW THEREFORE I, NKOSAZANA CLARICE DLAMINI ZUMA, MINISTER OF FOREIGN AFFAIRS OF THE REPUBLIC OF SOUTH AFRICA, declare that the Government of the Republic of South Africa, having considered the Protocol, hereby confirms and ratifies the same.

IN WITNESS WHEREOF I have signed this Instrument of Ratification at Pretoria on this the 30th day of March Two Thousand and [F]our."

received approval from Parliament for the ratification of the Protocol. Thereafter, the Instrument confirms that Government has now considered the Protocol and confirms and ratifies it (by depositing the signed Instrument of ratification), thereby binding South Africa to the Protocol almost three years after the Protocol was signed.

Ratifications of treaties in international law

3.15. The 2014 Protocol expressly provides that it must be ratified by SADC member states.

3.16. Ratification is the international act whereby a state establishes on the international plane its consent to be bound by a treaty.[63]

3.17. Multi-lateral international agreements generally require ratification (by states that have signed the agreements) to become binding on those states.

3.18. The requirement of ratification has now become standard in most multilateral treaties, precisely to allow for the states to comply with domestic obligations and in order to consider whether they wish to be bound.

3.19. As Shaw has pointed out, "*where the convention is subject to acceptance, approval or ratification,* ***signature will in principle be a formality and will mean no more than that state representatives have agreed upon an acceptable text, which will be forwarded to their particular governments for***

[63] Aust *Modern Treaty Law and Practice* (3rd ed, 2013) p 94; Article 2(1)(b) of the Vienna Convention on the Law of Treaties, 1969.

the necessary decision as to acceptance or rejection."[64]

3.20. As Crawford (currently a judge of the International Court of Justice) similarly points out in the current edition of *Brownlie's Principles of Public International Law*, "*[w]here the signature is subject to ratification, acceptance, or approval,* ***signature does not establish consent to be bound nor does it create an obligation to ratify***."[65]

3.21. International law recognises that allowing for consent by ratification serves important domestic and international law objectives. As Shaw opines, "*Although ratification (or approval) was originally a function of the sovereign, it has in modern times been made subject to constitutional control.* ***The advantages of waiting until a state ratifies a treaty before it becomes a binding document are basically twofold****: internal and external. In the latter case, the* ***delay***

---

[64] Shaw *International Law* (8th ed, 2017) p 690-691 (emphasis added), and see also J. G. Starke QC, *Introduction to International Law*, Ninth edition (1984) 429. We note that in terms of Article 18(a) of the Vienna Convention on the Law of Treaties 1969, simple (non-binding) signature which is subject to ratification, creates a general good faith duty on the international plane, to refrain from seeking to defeat the objects of the agreement (i.e. taking steps to render the treaty inoperative) prior to a decision being taken whether or not to ratify the treaty. South Africa is not a party to the Vienna Convention and therefore this good faith duty, would only be of any relevance if it formed part of customary international law. As this Court has held that "*the extent to which the Vienna Convention reflects customary international law is by no means settled."* (*Harksen v the President* 2000 (2) SA 825 (CC) para 26). In the leading comprehensive commentary on the Vienna Convention, the authors note 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*." (Corten and Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* 2011, p 374). But even assuming Article 18(a) is a customary rule, all it does is to create a good faith duty, on the international plane, after signature and before an express decision has been taken whether or 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). It does not create an obligation to ratify a treaty; it does not create an obligation to comply with the treaty; and it does not bring a treaty into force. See 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; *North Sea Continental Shelf*, Judgment, ICJ Reports 3, paras 25-36; Aust Modern Treaty Law and Practice (3rd ed, 2013) p 103. The Article 18 duty (to refrain from defeating the object of the treaty, until a decision is made whether to ratify) can have no practical consequences for signature of the 2014 Protocol which has as its object the defining of the jurisdiction of an international tribunal, if and when it comes into force.

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

between signature and ratification may often be advantageous in allowing extra time for consideration, once the negotiating process has been completed. *But it is the internal aspects that are the most important, for they reflect the change in political atmosphere that has occurred in the last 150 years and has led to a much greater participation by a state's population in public affairs.* ***By providing for ratification, the feelings of public opinion have an opportunity to be expressed with the possibility that a strong negative reaction may result in the state deciding not to ratify the treaty under consideration***."[66]

3.22. Similarly, Aust in this seminal work on the law of treaties opines that *"[t]he normal reason for requiring ratification is that,* ***after the adoption and signature of a treaty, one or more of the negotiating states will need time before it can give its consent to be bound. There can be various reasons for this****. First, the treaty may require legislation. …. Second, even if no legislation is needed, the* ***constitution may require parliamentary approval of the treaty, or some other procedure like publication, before the treaty can be ratified. Third, even if no legislative or other constitutional process has to be gone through, the state may need time to consider the implications of the treaty. That a state has taken part – even an active part – in the negotiations does not necessarily mean that it is enthusiastic about the subject, or the text that was finally agreed, or there may have been a change of government. The breathing space provided by the ratification process allows time for***

[66] Shaw *International Law* p 691 (emphasis added).

sober reflection before the instrument of ratification is lodged."[67]

The international relations competence of the national executive

3.23. The Court has made clear that the executive's conducting of international relations with foreign states (for instance engaging in diplomatic protection) is "*an aspect of foreign policy which is essentially the function of the Executive*."[68]This is an area in which the courts will give the executive significant deference.[69]

3.24. Thus, this Court held that "*Courts required to deal with such [international relations] matters will, however, give particular weight to the government's special responsibility for and particular expertise in foreign affairs, and the wide discretion that it must have in determining how best to deal with such matters*."[70]

3.25. In contextualising the need for the Court to give the executive a wide discretion, and give particular weight to the government's expertise, Chaskalson CJ referred approvingly to Germany's Constitutional Court's rationale for this: "*[t]he scope of discretion in the foreign policy sphere is based on the fact that the shape of foreign relations and the course of their development are not determined solely by the wishes of the Federal Republic of Germany and are much more dependent upon circumstances beyond its control*."[71]

---

67 Aust *Modern Treaty Law and Practice* (3rd ed, 2013) p 94-95 (emphasis added).
68 *Kaunda* para 77.
69 See *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC) (*Geuking*) para 26.
70 *Kaunda* para 144.
71 *Kaunda* para 74, referring to the *Hess* decision 55 BVerfGE 349 (90 ILR 386) at 396.

3.26. Thus, as this Court has made clear that international relations decisions, such as whether to agree to a foreign state's request for extradition, will often be based on issues of international comity between states and not necessarily on the underlying merits of the decision. In *Geuking*, which dealt with the exercise of the President's powers in relation to extradition, the Constitutional Court held that the decision whether to extradite a person was "*a policy decision which may be based on considerations of comity or reciprocity between the Republic and the requesting State.* ***The decision is based not on the merits of the application for extradition but on the relationship between this country and the requesting State***."[72] The Court went on to hold that *"****[t]he President*** *in deciding whether to consent to the surrender of a person under s 3(2)* ***must be free to take into account any matter considered relevant to what is a policy decision relating to foreign affairs. It is not for the courts to determine what matters are appropriate or relevant for that purpose***."[73]

Rationality review of executive decisions

3.27. The declaration of invalidity in relation to the signature was based on a finding of irrationality. We briefly consider the nature of rationality review of executive decisions.

3.28. While legislation or conduct may be challenged on grounds of irrationality, this Court has emphasised the narrow scope of review of executive decision-

---

[72] *Geuking* para 26 (emphasis added).
[73] *Geuking* para 27 (emphasis added).

making.[74] This Court has made clear that:

3.28.1. Rationality review is a very low standard of review. This Court noted in *Democratic Alliance v the President* that the rationality standard "*by its very nature prescribes the lowest possible threshold for the validity of executive decisions*".[75]

3.28.2. This Court has held that the rule is 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*". [76] This Court emphasised that the reason for limiting review of executive decisions to rationality, and not generally for procedural unfairness or unreasonableness, is "*precisely to ensure that the principle of the separation of powers is respected and given full effect*."[77]

3.28.3. The sole question that the Court must ask is whether, objectively viewed, the decision was rationally connected to the purpose for which the power was given.[78] Thus, it will rarely ever be the case that a decision is objectively irrational. [79]

3.28.4. The rationality review standard means that a "*Court cannot interfere with the*

---

[74] See e.g. *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) (*Democratic Alliance v President*) para 41.
[75] *Democratic Alliance v the President* para 42.
[76] *Democratic Alliance v President* para 41; see also *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 77.
[77] *Democratic Alliance v the President* para 41.
[78] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (*Pharmaceutical Manufactures*) paras 85 – 86.
[79] *Pharmaceutical Manufacturers* para 90.

decision simply because it disagrees with it or considers that the power was exercised inappropriately".[80]

3.28.5. This Court has recently held that "*[t]he discretion to choose suitable means is that of the repository of public power. The exercise of that discretion is not susceptible to review on the ground of irrationality unless there is no rational link between the chosen means and the objective for which power was conferred*."[81]

3.28.6. Thus, the rationality review standard does not allow the courts to make policy choices which are the preserve of the elected branches of government.[82]

3.28.7. This Court recently emphasised that, at all times, rationality must be disciplined by the separation of powers.[83]

4. THE DECLARATION OF INVALIDITY SHOULD NOT BE CONFIRMED

4.1. The High Court declared that President Zuma's signature of the 2014 Protocol is *"unlawful, irrational and thus, unconstitutional"*.[84] We submit that, the High Court's declaration of invalidity is based on a number of material errors. An

---

[80] *Pharmaceutical Manufacturers* para 90.

[81] *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20 para 56.

[82] *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA) para 59 and *Jooste v Score Supermarket Trading (Pty) Limited (Minister of Labour intervening)* 1999 (2) SA 1 (CC) para 17.

[83] *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) (*Electronic Media Network)* para 5, referring to *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) (*Albutt)* para 51.

[84] Judgment para 72, order 1, Record v1 p 104.

analysis of these errors demonstrates why this Court should not confirm the declaration of invalidity.

The signature did not bind South Africa and it had no effect on whether the Protocol would enter into force

4.2. The High Court appears to have based its decision and much of its reasoning on the assumption that the 2014 Protocol bound South Africa merely on President Zuma's signature. This appears, *inter alia*, from the fact that the Court held that "*the Tribunal's jurisdiction was simply signed away*" by President Zuma,[85] and that President Zuma's signature "*severely undermined the crucial SADC institution, the Tribunal*".[86]

4.3. This fundamental error formed the predicate for the declaration. It was plainly wrong.

4.4. The 2014 Protocol is an international agreement that requires ratification to become binding, not signature. Therefore, any signature of the Protocol was thus merely a formality, not a binding signature. Article 52 provides that, "*This Protocol shall be ratified by Member States who have signed the Protocol in accordance with their constitutional procedures*."

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

---

[85] Judgment para 69, Record v1 p 87.
[86] Judgment para 71, Record v1 p 89.

Article 53 provides that, "*This Protocol shall enter into force thirty (30) days after the deposit of the Instruments of Ratification by two-thirds of the Member States*." Article 55(1) specifies how an instrument of ratification is deposited: "*all Instruments of Ratification ... shall be deposited with the Executive Secretary of SADC who shall transmit certified copies to all Member States*." The 2014 Protocol, therefore, would only enter into force if 10 member states were to deposit instruments of ratification. To date none have.

4.6. It is only if the 2014 Protocol enters into force that it would change the Tribunal's jurisdiction by repealing and replacing the 2000 Protocol. This is so since the 2014 Protocol makes clear in Article 48, that "*[t]he 2000 Protocol on the Tribunal in the Southern African Development Community is repealed with effect from the date of entry into force of this Protocol*."

4.7. Section 231(1) of the Constitution only gives the executive a preliminary power to undertake the "*exploratory work*" of negotiating and signing international agreements, but this does not bind South Africa to such international agreements.[87] As was held by a full bench in *ICC Withdrawal*, the executive's signature of an international agreement "*has no direct legal consequences*".[88]

4.8. Moreover, the State confirmed on affidavit that:[89]

4.8.1. It has not as yet decided whether to seek to ratify the Protocol (the decision was pended given the application to challenge the constitutionality of the

[87] *ICC Withdrawal* para 55; *Glenister II* para 95.
[88] *ICC Withdrawal* para 47.
[89] State's AA, para 79.5, Record v8 p 759; State's Further AA para 20.8, Record v10 p 958-9.

signature);

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

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

4.9. All of this is separate from any question of whether, as a matter of domestic constitutional law, the Protocol is a section 231(2) or (3) agreement. Since, even if, for argument's sake, the Protocol was a section 231(3) agreement which does not require approval from Parliament to be made binding (as the Zimbabwean applicants still appear to suggest may be the case)[90] all this would mean is that if the executive wished to bind South Africa to the 2014 Protocol it would be at liberty, as a matter of domestic constitutional law, to deposit the instrument of ratification with SADC to bind South Africa, without first obtaining Parliament's approval. However, the State has not deposited an instrument of ratification. The State has said that if it decides that South Africa should ratify the Protocol, it would approach Parliament for approval to do so.[91]

4.10. The 2014 Protocol is, in any event, as the State expressly accepts, clearly a section 231(2) agreement, which requires Parliament's approval, after

[90] Zimbabwean applicants' written submissions footnote 200.
[91] State's AA, para 79.5, Record v8 p 759.

negotiation and signature to be made binding, because:

4.10.1. The 2014 Protocol expressly requires ratification, in accordance with each state's "*constitutional procedures*" (Article 52). The High Court in *ICC Withdrawal* accepted that where an international agreement requires ratification, it must be tabled under section 231(2) since the Court held that "*ratification... requires prior parliamentary approval in terms of s 231(2).*"[92] This is in accordance with this Court's determination in *Glenister II*.[93]

4.10.2. In any event, the 2014 Protocol is not an agreement of a "*technical, administrative or executive nature*" (as provided for in section 231(3)). As the High Court held in *Earthlife Africa* the agreements that can be tabled under 231(3) are "*a limited subset of run of the mill agreements (or as Professor Dugard puts it, agreements 'of a routine nature, flowing from daily activities of government departments') which would not generally engage or warrant the focussed attention or interest of Parliament.*"[94] The 2014 Protocol, if it were to come into force, would repeal and replace the 2000 Protocol; it would govern the Tribunal, and in particular change the jurisdiction of the Tribunal, removing its ability to entertain individuals' complaints. Therefore, it is not a run of the mill agreement; it is not routine in nature; and it would warrant the focussed attention of Parliament. This is precisely why the State has indicated that if it decides that South Africa should ratify the Protocol it would first seek Parliament's approval.

---

92 *ICC Withdrawal* para 47.
93 *Glenister II* para 95.
94 *Earthlife Africa* para 114.

4.10.3. Moreover, if there was any doubt on this score (which there is not), then, as the High Court in *Earthlife Africa* found, even if an agreement might in principle fall within the terms of section 231(3), and therefore not require Parliament's approval, the State would be entitled to make use of the more onerous procedure in section 231(2) to obtain parliamentary approval in order to make the agreement binding.[95] In this matter the State has been clear that it would not seek to bind South Africa to the Protocol, by depositing an instrument of ratification, without first approaching and obtaining the approval of Parliament.

The challenge to the signature was premature

4.11. Once one accepts that President Zuma's signature did not bind South Africa to the Protocol, nor did it have any effect on whether the Protocol would ever come into force, it is clear that the High Court ought to have held that the challenge to the constitutionality of the signature of the 2014 Protocol was premature.

4.12. Even if President Zuma's signature of the 2014 Protocol constitutes the exercise of public power, this is not determinative of whether a challenge to the particular exercise of public power is ripe for determination. As this Court has recently held "*rationality is not a master key that opens all doors, anytime, anyhow and judicial encroachment is permissible only where it is necessary and unavoidable to do so*."[96]

---

[95] *Earthlife Africa* para 137.
[96] *Electronic Media Network* para 85.

4.13. In *Earthlife Africa*[97] the Court held that it is premature and a violation of the separation of powers to allow a challenge to the rationality and constitutionality of the signature of an international agreement if the agreement would still need to be tabled before Parliament for approval to make it binding. As the Court held, "*[s]hould the executive* ***then choose to table the Agreement before Parliament in terms of sec 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.* ***The outcome of this process cannot be foreseen nor should it be anticipated****. In these circumstances* ***it would be invidious if the Court were, at this stage, to declare that certain of its provisions are inconsistent with the Constitution and, more specifically, sec 217 thereof. This is not to suggest, however, that the Court will lack jurisdiction to deal with such a question in future if the need should arise***."[98]

4.14. The same holds true in this matter. Whatever substantive arguments might be marshalled as to why the 2014 Protocol, if it were to come into force, might be found to violate any international obligations or constitutional provisions and whether any such violations might be justifiable, it would be invidious for this Court, at this stage, to make such determinations. The executive has not taken any decision as to whether or not South Africa should become a party to and bound by the 2014 Protocol, which would require ratification of the Protocol, pursuant to parliamentary approval. Even if the executive concludes that South

---

97 *Earthlife Africa* supra.
98 *Earthlife Africa* para 120 (emphasis added).

Africa should become a party to the Protocol and therefore tables the Protocol before Parliament to seek its approval, Parliament would have to fulfil its constitutional obligation to consider whether or not to approve the 2014 Protocol. As was held in *Earthlife Africa*, the "***outcome of this process cannot be foreseen nor should it be anticipated***."[99]

4.15. Moreover, a challenge to the signature of an international agreement, which is subject to ratification, is analogous to a challenge brought to the introduction of a Bill before Parliament, where a Court is asked to intervene prematurely in the legislative process. In *Glenister I*, this Court dismissed an application, *inter alia*, seeking to declare that the Cabinet's initiation of legislation (by introducing a bill into Parliament) for the abolition of the Scorpions was unconstitutional and invalid.[100] The Court dismissed the application on the basis of prematurity. It held that it would only be in exceptional circumstances, where clear and immediate harm could be shown, that "*will be material and irreversible*", which could not be remedied in due course, that the Court would consider intervening at the preliminary stage, before Parliament had yet considered the Bill.[101]

4.16. This Court emphasised that it "*must proceed on the basis that Parliament will observe its constitutional duties rigorously. If it is correct that the draft legislation* ***does threaten structural harm to the Constitution or the institution of the NPA, something which I expressly refrain from deciding, then Parliament will be under a duty to prevent that harm. It would be institutionally***

---

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

inappropriate for this court to intervene in the process of lawmaking on the assumption that Parliament would not observe its constitutional obligations*. Again, should the legislation as enacted be unconstitutional for the reasons proffered by the CFCR, appropriate relief can be obtained thereafter."*[102]

4.17. We submit that the same holds true in relation to the approval of international agreements.

4.18. Therefore, mere signature of the 2014 Protocol creates no exceptional circumstances, nor is there imminent and irreversible harm in the present matter that requires a court to intervene, and thus violate the separation of powers:

4.18.1. The applicants' substantive concerns relate to a change to the jurisdiction of the Tribunal from being able to hear individual complaints to only being able to hear interstate complaints. However, it is only if the 2014 Protocol comes into force that it will replace the 2000 Protocol, and thus change the jurisdiction of the Tribunal, so that Tribunal can only hear inter-state complaints.

4.18.2. Signature of the 2014 Protocol does not bind South Africa and it does not obligate South Africa to ratify the Protocol. Only depositing an instrument of ratification (after obtaining parliamentary approval) can bind South Africa and add to the tally of ratifications required for the 2014 Protocol to enter into force. Therefore the signature of the 2014 Protocol had no legal effect on

[102] *Glenister I* para 56 (emphasis added).

whether the 2014 Protocol will ever come into force.

4.18.3. In order to bind South Africa, South Africa would need to ratify the Protocol. This would require the executive to first decide that South Africa should become a party to, and be bound by, the Protocol by ratifying it (which would then require the executive to table the Protocol before Parliament so that Parliament can consider whether to approve the Protocol). That decision has not yet been made. In making that decision the executive would need to carefully consider both its constitutional and international law obligations.

4.18.4. The Court should not intervene on the assumption that *the executive* will not observe its constitutional obligations.

4.18.5. Were the executive to decide that South Africa should become a party to the Protocol, it would need to table the Protocol before Parliament and set out substantive grounds for why Parliament should approve the Protocol (in terms of section 231(2)).

4.18.6. Thereafter, if and only if Parliament approves the Protocol, then the executive would need to lodge an instrument of ratification with SADC.

President Zuma's signature did not violate the SADC Treaty or the 2000 Protocol

4.19. The High Court, absent proper explanation, held that President Zuma's signature of the 2014 Protocol was unlawful, since it violated the terms of the SADC Treaty

and the 2000 Protocol.[103]

4.20. This is clearly incorrect, and it appears that the findings were based, once again, on eliding the distinction between the suspension and the signature, and misunderstanding their distinct legal effects.

4.21. ***First***, the SADC Treaty in Article 16 does not determine the jurisdiction of the Tribunal. The Treaty expressly leaves issues such as the Tribunal's jurisdiction to be determined by "*a Protocol… adopted by the Summit*".

4.22. Article 16 makes clear that the Summit is entitled to adopt the Protocol that sets out the jurisdiction of the Tribunal.

4.23. It is for this reason that the 2000 Protocol, which is currently in force, governs the Tribunal's jurisdiction.

4.24. While Article 16 makes clear that a Protocol in relation to the Tribunal forms an integral part of the Treaty, it is evident that the Summit can choose to adopt a new Protocol in relation to the Tribunal to replace the current 2000 Protocol.

4.25. It is only if the 2014 Protocol were to ever come into force that it would replace the 2000 Protocol, and thus alter the Tribunal's jurisdiction.

4.26. ***Second***, in this context it is also important to emphasise certain general points:

---

[103] Judgment paras 66 and 67, Record v1 p 99-100.

4.26.1. There is no general international obligation which requires sovereign states to subject their sovereignty, and that of their own courts and constitutions, to the jurisdiction of an international court.

4.26.2. In fact, the position is exactly the opposite. International courts can only exercise jurisdiction over states if they consent to it.[104] As Aust points out "*a state can be made subject to the jurisdiction of an international court or tribunal only if it consents*".[105]

4.26.3. Even where states agree to create international courts, they are not obligated to allow individuals to approach these bodies. The pre-eminent international court of the international community, the International Court of Justice, can only hear complaints brought by states.[106] And the International Court of Justice can only exercise jurisdiction if those states have consented to that jurisdiction.[107] Similarly, both the African Court on Human and People's Rights,[108] and the Inter-American Court of Human Rights[109], only have jurisdiction to hear individual complaints if the states parties have specifically given consent for this.

4.27. ***Fourth***, South Africa's international law obligations that flow from the SADC

---

[104] *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA) para 78.
[105] Aust *Modern Treaty Law* p 256.
[106] UN Charter, Articles 92 and 93, and the Statute of the ICJ, Article 34(1).
[107] Article 36 of the Statute of the ICJ.
[108] 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
[109] Articles 61 and 62 of the American Convention on Human Rights.

Treaty and the 2000 Protocol are owed to SADC and its member states.[110] It is SADC and those member states that drafted, recommended and adopted the 2014 Protocol. It could hardly then be in violation of South Africa's international obligations to SADC and its member states, merely to sign (while not ratifying) a protocol which SADC and its member states adopted. And, of course, "*parties, acting collectively through their concordant practice, are the masters of their treaty*".[111]

4.28. As made clear above, since 2012, the procedure adopted by SADC, its member states, and institutions (in particular, the Summit, the Council of Minister, and the Committee of Ministers of Justice) was to negotiate and adopt a new Protocol. The Protocol would only come into force and replace the 2000 Protocol when the required number of ratifications had been received, after each state had complied with its own constitutional processes.

4.29. In the circumstances, it is clear that President Zuma's mere signature of the 2014 Protocol as drafted and approved by the SADC Committee of Ministers of Justice and then adopted by the SADC Summit, on the recommendation of the SADC Council of Ministers, does not bind South Africa and does not bring the Protocol into force, and does not violate the SADC Treaty or the 2000 Protocol.

---

[110] This is the fundamental rule of treaty law: a treaty applies only between the state parties to it. See *Brownlie's Principles of International Law* p 384.

[111] Dörr & Schmalenbach *Vienna Convention on the Law of Treaties: A commentary* (2012), p 523. It should be noted that in terms of Article 31(3)(b) of the Vienna Convention, when interpreting treaties regard should be had to subsequent practice by the parties in the application of the treaty.

President Zuma's reasons for signature were explained, it was not purposeless, irrational or in bad faith

4.30. In finding that President Zuma's signature was substantively irrational, the High Court made the following inter-related findings:

4.30.1. "*Furthering diplomatic relations, **is not** a constitutionally-authorised purpose to be fulfilled through signing treaties under s 231(1) of the Constitution*";[112]

4.30.2. "*[T]here [wa]s* no *explanation why the Protocol was signed by the President if, as is now contended, it was not intended to bind South Africa*";[113]

4.30.3. That if the signature was not legally significant then it was effectively purposeless, and therefore irrational;[114] and

4.30.4. That the signature "*was at the instance of the violator of the Tribunal's orders (the Zimbabwe Government) [and]…contrary to the advice of the [Committee of] Ministers of Justice and Attorneys-General*".[115]

4.31. These findings are factually and legally incorrect.

4.32. ***First***, the conducting of diplomatic relations (usually referred to as international relations or foreign affairs) is precisely the purpose for which section 231(1) authorises the executive to negotiate and sign international agreements with

[112] Judgment para 70, Record v1 p 89 (emphasis added).
[113] Judgment para 69, Record v1 p 88.
[114] Judgment para 70, Record v1 p 88-89.
[115] Judgment para 68, Record v1, p 87-88.

other foreign states:

4.32.1. As the Court held in *ICC Withdrawal*, section 231(1) empowers the executive to do exploratory work with other states before entering into a binding agreement.[116]

4.32.2. In *Kaunda*, O'Regan J held that the fact that "*foreign affairs is primarily the responsibility of the Executive*" is signified *inter alia* by the fact that the Constitution provides "*that the national executive is responsible for negotiating and signing international agreements*."[117]

4.33. ***Second***, section 231(1) only gives the executive a preliminary power to undertake the "*exploratory work*" of negotiating and signing international agreements, but this does not bind South Africa to such international agreements.[118] That is why, as the court held in *ICC Withdrawal*, the signature of an international agreement which is subject to ratification "*has no direct legal consequences*".[119]

4.34. Thus, the signature of an international agreement subject to ratification is a formality. It does not bind the State, and it provides the State with the opportunity to then consider whether South Africa should ratify the treaty, and allows the State to comply with its constitutional obligations. Should the executive decide that the treaty should be ratified, it would need to seek parliamentary approval.

---

[116] *ICC Withdrawal* para 55.
[117] *Kaunda* para 243.
[118] *ICC Withdrawal* para 55.
[119] *ICC Withdrawal* para 47.

Thus the fact that the signature is a formality and does not bind South Africa, does not mean it is purposeless. Rather, as held in *ICC Withdrawal*, and provided for in section 231, the (non-binding) signature of international agreements is part of the executive's exploratory work of treaty negotiation.

4.35. Not only is this clearly the purpose of signature set by section 231(1). This is also in accordance with international authority discussed above.[120]

4.36. ***Third***, given the proper constitutional context, and the terms of the 2014 Protocol that was signed, President Zuma clearly sets out the reasons for his signature of the 2014 Protocol. In particular:[121]

4.36.1. President Zuma took into account that the signature would not bind South Africa to the 2014 Protocol or bring it into force, since the Protocol requires ratification to bind member states. In other words, his signature would have no effect on the jurisdiction of the Tribunal. The Protocol that was negotiated, and which President Zuma signed, does not seek summarily to change the jurisdiction of the Tribunal. Rather it intentionally and explicitly ensures that such a change could only occur if the super-majority of member states ratify the Protocol after compliance with their own constitutional procedures. Thus, the Protocol specifically ensured that South Africa's constitutional procedures (in particular parliamentary approval, and concomitant public participation) would have to be observed before South Africa could be bound by the Protocol.

[120] See above paras 3.20 to 3.22.
[121] State's Further AA para 27, Record v10 p 961-4.

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

4.36.3. Therefore, President Zuma's signature was intended to demonstrate no more than that South Africa was willing to consider whether to ratify the Protocol, in accordance with its constitutional obligations, on the basis that the Protocol was the outcome of the collective, multilateral, negotiations by SADC member states and its institutions (over two years).

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

4.36.5. The signature was therefore not an action that would signal South Africa's consent to be bound; it merely acknowledged the outcome of collective negotiation and drafting, and allowed for a careful, substantive determination as to whether South Africa should seek ratification of the Protocol in accordance with its constitutional procedures.

4.37. Of course, when considering the rationality of President Zuma's conduct, this Court must bear in mind that in conducting international relations the executive effectively engages in making policy decisions, and this is an area in which the

courts will accord the executive significant deference.[122] These decisions make clear that often policy decisions in relation to foreign affairs are not based only on the underlying merits, but on issues in relation to comity and the relationship between states.[123] The executive "*must be free to take into account any matter considered relevant to what is a policy decision relating to foreign affairs***"**, in particular, comity.[124] This is particularly so when the international relations conduct, such as non-binding signature, does not have any direct legal consequences, and does not create or take away rights.

4.38. Given that context, it certainly was neither irrational nor in bad faith for President Zuma to sign the Protocol. The whole purpose of requiring ratification as a matter of international and constitutional law, is so that when multi-lateral treaties are negotiated and signed, states have time (a) to make a substantive determination of whether they wish to consent to be bound by the treaty, and (b) so they can comply with their constitutional obligations, such as seeking parliamentary approval.

4.39. ***Fourth***, the facts are clear:

4.39.1. There was an extensive process of negotiation within SADC and its various institutions to prepare and adopt a new Protocol for the Tribunal;[125]

4.39.2. The Committee of Ministers of Justice negotiated and approved the final

[122] See Section 3, Heading: The international relations competence of the national executive.
[123] See in particular *Geuking* para 26.
[124] *Geuking* para 27.
[125] State's AA para 73, Record v8 p 756-7.

draft of the Protocol (the 2014 Protocol);[126]

4.39.3. The Committee of Ministers of Justice recommended the 2014 Protocol to the Council of Ministers and the Summit for consideration;[127]

4.39.4. The Council of Ministers considered and approved the 2014 Protocol and recommended to the Summit that it adopt the 2014 Protocol;[128]

4.39.5. The Summit, on the recommendation of the Committee of Ministers, adopted the 2014 Protocol;[129]

4.39.6. Thus, the 2014 Protocol that President Zuma signed:

4.39.6.1. was adopted by the Summit, recommended by the Council of Ministers, and drafted and approved by the Committee of Ministers of Justice;

4.39.6.2. was the product of detailed negotiation and consensus building, and was not the product of or at the instance of any one member state; and

4.39.6.3. provides for entry into force only if it is ratified by members states in

[126] State's AA para 73, Record v8 p 756-7.
[127] State's AA para 73, Record v8 p 756-7; Law Society's FA para 14, Record v1, p 169.
[128] State's AA para 74, Record v8 p 756-7.
[129] State's AA para 74, Record v8 p 757.

accordance with their own constitutional procedures.[130]

4.40. In the circumstances, given the non-binding nature of the signature it was clearly rational and not in bad faith, to sign the Protocol:

4.40.1. based on considerations of comity and as part of the exploratory work undertaken during a multilateral treaty-making process (given that the Protocol represented the outcome of over two years of negotiation and drafting by the various SADC institutions and member states, and was adopted and recommended by the Summit, the Council of Ministers, and the Committee of Ministers of Justice); and

4.40.2. so as to allow the State to then undertake a substantive consideration of whether South Africa should consent to be bound by the Protocol, in accordance with the State's constitutional obligations.

There was no duty on President Zuma to consult the public prior to signature of the 2014 Protocol

4.41. The Court erred in determining that the signature was irrational since there was no consultation with affected persons (including, in particular, those with vested rights before the Tribunal).[131]

[130] State's AA para 73, Record v8 p 756-7; State's AA paras 76 and 77, Record v8 p 757-8.
[131] Judgment para 69, Record v1 p 88.

4.42. The Law Society appears to support this argument.[132]

4.43. However, the High Court's finding fails to take account of the fact that 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 Protocol into force. Therefore, it could have no effect on any rights under the 2000 Protocol.

4.44. Since President Zuma's signature did not and could not affect any rights under the 2000 Protocol, a rational decision did not require him to consult with the public or any particular members of the public prior to signature.

4.45. The Constitution's structure and provisions envisage and support precisely this procedural approach. Section 231 empowers and mandates the executive to do the exploratory work of negotiating and signing international agreements, but it then requires the executive to go to Parliament, the people's representatives, to obtain authority and approval for South Africa to be bound by the international agreement.[133]

4.46. The Constitution then appropriately places a duty on Parliament to conduct public participation in relation to Parliament's legislative and other processes (which includes approving international agreements). [134] This is the constitutionally appropriate time to conduct any necessary public participation since it is only when the Protocol is ratified that it may be made binding on South Africa.

---

[132] Law Society's written submissions para 100.
[133] *ICC Withdrawal para 55.* See also *Glenister II*, para 95.
[134] See *Earthlife Africa* para 114.

4.47. The provisions of section 231 of the Constitution exist 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.[135]

4.48. President Zuma's signature certainly did not violate or threaten section 34 of the Constitution (as the Law Society seems to suggest),[136] since:

4.48.1. the signature have no legal effect on the jurisdiction of the Tribunal; and

4.48.2. in any event, section 34 is a right of access to courts in South Africa, not an extra-territorial right to be given access to international courts.[137]

Parliamentary approval was not required prior to signature of the 2014 Protocol

4.49. The Court held President Zuma's signature was irrational and unconstitutional since he signed the Protocol "*without consultation and approval of the South African Parliament*".[138]

4.50. This demonstrates, with respect, the extent of the High Court's confusion in relation to how section 231 operates, and the legal effects of signature.

---

[135] *ICC Withdrawal* para 47.

[136] Law Society written submissions para 100.

[137] *Kaunda* para 44; *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. The African Commission also 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. 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).

[138] Judgment para 69, Record v1 p 88.

4.51. The Constitution, and the case law (as discussed above),[139] is clear. In terms of section 231(1), negotiation and signature of international agreements does not require parliamentary approval. Rather, in terms of section 231(2), it is ratification of an international agreement, which binds South Africa, which requires parliamentary approval.

4.52. The State has not ratified the 2014 Protocol.

4.53. The State has confirmed that if it decides that South Africa should ratify the 2014 Protocol to make it binding, the State would first table the 2014 Protocol before Parliament, in terms of section 231(2), to seek Parliament's approval.

5. CONCLUSION AND RELIEF

5.1. For the reasons set out above, the declaration that President Zuma's signature of the 2014 Protocol was unconstitutional should not be confirmed.

5.2. The State accepts that the *Biowatch* principle applies in this matter, and therefore costs should be governed thereby.[140] If the Court does not confirm the invalidity of President Zuma's signature, then all parties should bear their own costs.

5.3. However, the Court should set aside the costs order in the High Court granted in favour of the *amici*. As this Court has held, an *amicus* "*is neither a loser nor a*

[139] See for example *Glenister II* and *ICC Withdrawal*.
[140] *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (6) 232 (CC) paras 23-24.

winner and is generally not entitled to be awarded costs."[141] The High Court gave no reasons for awarding costs to the *amici*. Nor could there be any reasons, since the amici's arguments were not the basis for either declaration of invalidity.

_____

GILBERT MARCUS SC
ANDREAS COUTSOUDIS
HEPHZIBAH RAJAH

Chambers, Sandton and Durban

2 August 2018

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

LIST OF AUTHORITIES

Case Authorities

1 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC)
2 *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (6) 232 (CC)
3 *Democratic Alliance v Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP)*
4 *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC)*
5 *Earthlife Africa and Another v Minister of Energy and Others* 2017 (5) SA 227 (WCC)*
6 *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* 2017 (9) BCLR 1108 (CC)
7 *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC)*
8 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)*
9 *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC)*
10 *Government of the Republic of Zimbabwe v Fick & others* [2012] ZASCA 122
11 *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC)
12 *Harksen v the President* 2000 (2) SA 825 (CC)
13 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC)
14 *Jooste v Score Supermarket Trading (Pty) Limited (Minister of Labour intervening)* 1999 (2) SA 1 (CC)
15 *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC)
16 *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC)
17 *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC)
18 *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA).
19 *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA)
20 *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC)
21 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

22 *Saamwerk Southwerke (Pty) Ltd v Minister of Mineral Resources and Another* [2017] ZASCA 56

Foreign and International Authorities

23 *Golha v The Czech Republic* (2011) ECtHR (Application No. 7051/06)
24 *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others* (Communication 409/12)
25 *Maclaine Watson & Co Ltd v International Tin Council* [1989] 3 All ER [HL]
26 *Maksimov v Russia* (2010) ECtHR (Application No. 43233/02)
27 *North Sea Continental Shelf, Judgment*, ICJ Reports 3
28 *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

29 Aust, *Modern Treaty Law and Practice* (3rd ed, 2013)
30 Corten and Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011)
31 Crawford, *Brownlie's Principles of Public International Law* (8th ed, 2012)
32 Dörr & Schmalenbach, *Vienna Convention on the Law of Treaties: A commentary* (2012)
33 Dugard, *International Law: A South African Perspective* (4th ed, 2011)
34 Francioni *Access Justice as a Human Right* (2007)
35 Shaw *International Law* (8th ed, 2017)
36 Starke QC *Introduction to International Law* (9th ed, 1984)