IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO 20382/15

In the matter between:

THE LAW SOCIETY OF SOUTH AFRICA	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 REPBLIC OF SOUTH AFRICA	Third Respondent

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THE FIRST TO THIRD RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

TERRESA NONKULULEKO SINDANE

do hereby make oath and say that:

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1.1 I am the Director General of the Department of Justice and Constitutional Development ("Justice"). I am duly authorized to represent the First to Third Respondents in these proceedings, and to depose to this affidavit on their behalf in opposition to the Applicant's application.

1.2 The facts contained in this affidavit are within my personal knowledge unless otherwise stated or where the converse appears from the context, and are to the best of my knowledge and belief both true and correct.

1.3 To the extent that I deal with matters that occurred prior to my appointment as the Director General of Justice, I do so on the strength of the information provided to me. I believe such information to be true and correct.

1.4 This affidavit is filed together with a confirmatory affidavit from the First Respondent and the Director-General of the Department of International Relations and Co-operation ("DIRCO"), Mr Jerry Matjila.

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2. Where I make legal submissions, I do so on the strength of legal advice received from the First to Third Respondents' legal representatives, which advice I accept to be correct.

3. I have read the founding affidavit deposed to by XOLANI MAXWELL BOQWANA dated 11 March 2015 and respond to it as set out below. All allegations in the founding affidavit that are inconsistent with what I state in this affidavit are denied.

4. In this affidavit I shall deal with the following matters in sequence:

4.1 Preliminary submissions, which entail a consideration of the importance of the Southern African Development Community ("SADC") and it consensual decision making process, the relevant parties and the relevant decisions, unreasonable delay in challenging the President's alleged participation in the suspension of the SADC Tribunal and that the challenge to the President's signature of the 2014 Protocol on the Tribunal in SADC ("the Protocol" or "the 2014 Protocol") has been brought prematurely before the Court;

4.2 The lack of a valid legal basis for the challenges brought in relation to the President's participation in the Summit's suspension of Tribunal and President's signing of the Protocol; and

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4.3 Responses to the allegations in the founding affidavit.

PRELIMINARY SUBMISSIONS

The importance of SADC and SADC's decision making process

5. It is important in order to properly contextualise this Court's consideration of the current application to emphasise that 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. In this regard, increased political and economic integration of SADC are important regional objectives. This includes the strengthening of the international economic competitiveness of the region.

6. SADC's shared vision is anchored on common values and principles and the historical and cultural affinities that exist between the people of Southern Africa. The regional vision is therefore entrenched in the importance of building a common future within a regional community that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice and peace and security for the people of Southern Africa.

7. In view of the colonial history of the SADC region, the principle of sovereignty, irrespective of the economic size of the particular SADC

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Member State, is a core consideration for all SADC Member States. As a result and in view of the challenging nature of decision making in a multilateral context compounded by the many ongoing challenges the region faces, it is important that all the SADC Members work together to advance mutual goals. Decision making within SADC should therefore be viewed in consideration of the challenges in the region. The SADC Treaty provides for decision making by consensus and this principle is followed in all SADC meetings including ordinary and extraordinary Summits. During decision making which are usually based on a multitude of varying factors including national interests, attempts are made to advance the combined and greater interest of the region.

8. SADC decision making is anchored in Article 10(9) of the SADC Treaty which outlines that "[u]nless otherwise provided in the Treaty, the decisions of the Summit shall be taken by consensus and shall be binding". Furthermore, the objectives of the SADC Common Agenda (as outlined in Article 5 of the SADC Treaty) clearly emphasises the centrality of the SADC Common Agenda being the objective to "promote common political values, systems and shared values which are transmitted through institutions which are democratic, legitimate and effective".

9. In view of this context, I now proceed to consider the relevant SADC decisions that are at issue in this application.

<u>The relevant parties and the relevant decisions</u>

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10. In paragraph 1 of the notice of motion, the Applicant, *inter alia*, seeks a declaration that the President's participation in suspending the SADC Tribunal was unconstitutional. In paragraph 72 of the founding affidavit, the Applicant states that:

> "The right of access to justice was infringed when the Tribunal was suspended by the Summit. **The Tribunal was suspended by the Summit held on 20 May 2011.** The First Respondent was represented by the South African High Commission in Namibia." [My emphasis]

11. Therefore, the key basis of the Applicant's challenge to the constitutionality of President's alleged participation in the suspension of the SADC Tribunal, appears to relate to the decision adopted by the SADC Summit of Presidents and Heads of Government ("the Summit") in May 2011. In the context of the suspension of the Tribunal, the Applicant also makes some reference to the August 2010 Summit which made certain preliminary decisions preceding the full suspension of the Tribunal, and the August 2012 Summit.

12. I attach hereto the official Communiqués setting out the decisions taken in those respective Summits, as well as the Records of the relevant SADC Summits as annexures **"JS1"**, **"JS1(a)"**, **"JS2"**, **"JS2(a)"**, **"JS3"** and **"JS3(a)"** respectively. The Communiqués should be read together with the Record, most especially where the one provides more information in relation to the relevant decisions taken than the other.

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13. For the sake of completeness, I will deal briefly with the relevant decisions taken at each of these Summits.

14. The 18 August 2010 Summit decided as follows (as set out in the Record **(JS1(a))**:

> "9.3 Summit endorsed the recommendation of Council in paragraph 9.3 not to reappoint Members of the Tribunal whose term of office expires in August 2010, for another five (5) year term, pending the Report on the Tribunal from Ministers of Justice/Attorneys-General.
>
> 9.4 **Summit agreed that the Members of the Tribunal shall remain in office pending the Report on the Tribunal from Ministers of Justice/Attorneys-General but shall not entertain new cases until the Extraordinary Summit has decided on the legal status and roles and responsibilities of the Tribunal.**
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> 9.5 Summit deferred consideration of the non-compliance with the Tribunal Ruling on Fick: L.K. and Others vs the Republic of Zimbabwe (case number SADC (T) 01/2010) by Zimbabwe, pending the completion of a study on the role, responsibilities and Terms of Reference of the SADC Tribunal." [My emphasis]

15. It is important to note that in terms of the 2010 Summit decisions, the Summit kept the Members of the Tribunal in office (although it decided as a preliminary decision, at that point, not to renew the term of office of those members whose term expired in August 2010 for a further five year term, until the Extraordinary Summit could properly consider this issue and make a final determination), but precluded the hearing of new cases,

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pending a decision to be taken by the Extraordinary Summit, which was to be held in May 2011.

16. The 20 May 2011 Summit decided as follows (as reflected in the Communiqué (**JS2**)):

> "6. Summit received and considered the Report of the Committee of Ministers of Justice/Attorneys-General on the review if the Role, Responsibilities and Terms of Reference of the SADC Tribunal in accordance with Summit Decision 20 August 2010 taken in Windhoek, Namibia.
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> 7. Summit decided as follows:
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> - mandated the Ministers of Justice/Attorneys-General to initiate the process aimed at amending the relevant SADC legal instruments and submit a progress report at the Summit in August 2011 and the final report to Summit in August 2012;
> - **not to reappoint members of the Tribunal whose term of office expired on August 31, 2010**; and
> - **not to replace members of the Tribunal whose term of office will expire on October 31, 2011.**
>
> 8. Summit further reiterated the moratorium on receiving any new cases or **hearings of any cases by the Tribunal until the SADC Protocol of the Tribunal has been reviewed and approved."** [My emphasis]

17. The Applicant avers that it was at this Summit that the SADC Tribunal was "suspended". Having regard to the relevant decision by the Summit, I have interpreted the reference to "suspension" to refer to the Summit's decision to put in place a "moratorium on receiving any new cases or hearings of any cases by the Tribunal until the SADC Protocol on the Tribunal has

been reviewed and approved". In this affidavit when I refer to the "suspension" of the Tribunal, this is what is meant, unless the context indicates otherwise. "Suspension" could presumably also be interpreted to include the decisions at the May 2011 Summit not to "reappoint members of the Tribunal whose term of office expired on August 31, 2010" and not to "replace members of the Tribunal whose term of office will expire on October 31, 2011." Nothing appears to turn on this issue.

18. The August 2012 Summit decided, in relevant part, as follows (as reflected in the Communiqué **(JS3)**):

> "24 Summit considered the Report of the Committee of Ministers of Justice/Attorneys-General and resolved that a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States."

19. The August 2012 Summit did not take any decisions in relation to the suspension of the Tribunal. However, as appears from the relevant decision set out above, the Summit decided to negotiate a new Protocol for the Tribunal which would change its jurisdiction. Since in terms of the May 2011 Summit decision the suspension was in place until "the SADC Protocol of the Tribunal ha[d] been reviewed and approved", this meant that until the new Protocol had been negotiated and come into force, the suspension would remained in place.

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20. The Applicant's affidavit and the Summit Communiqué make it clear that the President did not attend the May 2011 Summit. At the May 2011 Summit South Africa was represented by H.E YLM Myakayaka-Manzini, the South African High Commissioner to Namibia ("the High Commissioner"), who was duly authorised to represent the President and South Africa.

21. As appears from the decisions taken in the different Summits above, the Summit of August 2010 only imposed a partial moratorium on the SADC Tribunal receiving new cases pending the May 2011 Summit. A full moratorium on the SADC Tribunal receiving new cases and hearing existing cases was only adopted in the May 2011 Summit. It is this decision which the Applicant alleges violates the right of access to justice.

22. The High Commissioner is not a party to these proceedings. It is clear and is accepted by the Applicant that the High Commissioner was the President's representative at the relevant Summit at which the Tribunal was suspended. Therefore, to the extent that the Applicant alleges that the participation in this Summit was unconstitutional given that the suspension of the Tribunal allegedly violated the right of access to justice, then the relevant official has not been joined to these proceedings. It would appear that the High Commissioner may have a direct and substantial interest in this application, since the declaration of unconstitutionality would effectively be declaring that the nature of the High Commissioner's participation in the May 2011 Summit was unconstitutional.

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23. For the ease of reference, in the remainder of this affidavit, I will continue to use the Applicant's reference to its first challenge as a challenge to "the President's participation in the suspension of the Tribunal by the Summit" (or generically as a challenge to "the participation in the suspension"). However, as explained above, it was the High Commissioner who was the relevant official that participated in the May 2011 Summit at which the Tribunal was suspended.

Unreasonable delay in challenging the involvement in the suspension of the tribunal

24. There has been an unreasonable delay in the institution of the Applicant's challenge of the President's (and more correctly, the High Commissioner's) participation in the suspension of the SADC Tribunal. As has already been indicated above, a full moratorium on receiving new cases and hearing pending cases before the Tribunal was put in place by the Summit on 20 May 2011. The Applicant accepts this fact in paragraphs 39 and 72 of the founding affidavit. The Applicant alleges in paragraph 72 that it was the suspension of the Tribunal at the May 2011 Summit that violated the right of access to justice.

25. The suspension had endured for close to four years by the time that the Applicant instituted this application in March 2015. For the first time, in this application, the Applicant, now seeks a declaration that the

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President's participation in suspending the SADC Tribunal is unconstitutional.

26. I am advised and submit that this challenge ought to have been initiated without unreasonable delay following the 20 May 2011 Summit, the participation in which the Applicant alleges was unconstitutional because the Summit's suspension of the Tribunal violated the right of access to justice.

27. The Applicant has not tendered an explanation in the founding affidavit for the significant delay in seeking this relief. I submit that the delay was unreasonable. This is particularly so given the absence of an explanation for the delay and given the significant time that has elapsed since the relevant decision was taken by the Summit, during which time there have been three further annual Summit meetings and the negotiation and adoption of a new Protocol for the Tribunal.

28. In the circumstances, it is submitted that this Court should not exercise its discretion to condone the late filing of this challenge to the constitutionality of the participation in the Summit that suspended the Tribunal.

29. For the reasons set out above, I submit that the Applicant's challenge to the participation in the suspension of the Tribunal by the Summit should be dismissed.

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Relief sought in relation to the signature of the Protocol is premature

30. The Applicant alleges that the President's signature of the 2014 Protocol constitutes a violation of the right of access to justice because "the 2014 Protocol ... limits the jurisdiction of the Tribunal between member states only."[1]

31. The President's signature of the protocol must be understood in light of the provisions of the Protocol.

32. Article 52 of the Protocol provides that it "shall be ratified by Member States who have signed the Protocol in accordance with their constitutional procedures". Article 53 provides that the Protocol "shall enter into force thirty (30) days after the deposit of the Instrument of Ratification by two-thirds of the Member States".

33. This has three important implications:

33.1 First, the Protocol makes plain that signature of the Protocol does not bind a Member State; Member States are only bound by the Protocol after they have "ratified" it.

[1] Founding Affidavit paras 71-73.

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33.2 Second, ratification must be in accordance with each Member State's own domestic constitutional procedures.

33.3 Third, only if, and when, two-thirds of the Member States have ratified will the Protocol come into operation.

34. The Protocol has currently been signed by only 9 out of the 15 SADC Member States. In order for the Protocol to come into force (thereby repealing the 2000 Protocol)[2] it has to be ratified by 10 out of the 15 SADC Member States. The fact that currently the Protocol has not been signed by 10 Members States, means that it cannot come into force in terms of Article 53 of the Protocol even if it is ratified by all 9 Member States who have signed it (a further Member State would have to first sign and then ratify the Protocol). I attach hereto marked "**JS4**" the Protocol signed by 9 Member States including South Africa on 18 August 2014.

35. In terms of South Africa's "constitutional procedures", in order to ratify the Protocol this requires compliance with section 231 of the Constitution.

36. Section 231 of the Constitution provides, in relevant part, as follows:

> "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

[2] See Article 48 of the 2014 Protocol.

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> (2) **An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces**, unless it is an agreement referred to in subsection (3).
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time." [My emphasis]

37. The Protocol is evidently not an "international agreement of a technical, administrative or executive nature, or **an agreement which does not require either ratification or accession.**" Indeed, the Protocol expressly requires ratification, and is no mere technical or administrative treaty. In paragraph 18 of the founding affidavit, the Applicant accepts that the signing of the Protocol is subject to ratification in terms of the provisions of section 231 of the Constitution.

38. When section 231 of the Constitution is read together with Articles 52 and 53 of the Protocol, it is clear that in order for South Africa to ratify the Protocol and therefore be bound by it, the Protocol must first have "been approved by resolution in both the National Assembly and the National Council of Provinces". This has not yet occurred.

39. In the circumstances, I submit that the Applicant's challenge of the signing of the Protocol is premature. The Protocol expressly accepts that South Africa would only be bound by the Protocol if it is ratified in accordance with the provisions of section 231(2) of the Constitution. The President's

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signature on its own does not constitute agreement by the South African State to be bound by the Protocol. The President together with the national executive will now need to consider whether to seek to ratify the Protocol (thereby binding South Africa) in accordance with the constitutional laws of South Africa, by placing the Protocol before Parliament for its consideration and approval (which may not be given, even if sought).

40. The Protocol has not been placed before Parliament. I submit that it is only after any approval of the Protocol by Parliament, in terms of section 231(2) of the Constitution, that a court should entertain a challenge to the constitutionality of agreeing to be bound by the Protocol.

41. Thus in this case while the discretion to sign the Protocol is, in terms of the Protocol and the Constitution, vested in the President, as representative of the executive, that signature does not bind South Africa. That power is vested in Parliament that will have to consider the Protocol (if and when it is placed before Parliament) and determine, with due regard to the Constitution, which includes requirements in relation to public participation, whether to approve the Protocol in order to allow for ratification. There is no basis to assume that Parliament will fail to properly discharge its constitutional obligations under section 231.

42. In summary, therefore, the challenge to the President's signature of the Protocol is premature for the following reasons:

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42.1 The President, in consultation with the Cabinet, after a re-examination and consideration of the Protocol may decide not to seek to ratify the Protocol;

42.2 The signature of the Protocol, does not affect any future decision by Parliament as to whether to approve the Protocol, which is a necessary prerequisite for ratification.

42.3 Parliament, after a public participation process, which would allow, *inter alia*, the Applicant to make representations, may elect not to approve the Protocol;

43. During any parliamentary approval process as a necessary prerequisite to ratification, Parliament will have an opportunity to:

43.1 conduct a public participation process, that will ensure that members of the public and organisation such as the Applicant will be able to make representations as to whether the Protocol should be ratified;

43.2 re-examine and review the Protocol, on its own, in light of the public participation process, and determine whether to approve the Protocol;

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43.3 refuse to approve the Protocol, thus ensuring that South Africa will not ratify and not be bound by the Protocol.

44. In conclusion, I point out that there are important constitutional and separation of powers issues that should inform this Court's decision whether to entertain the Applicant's premature challenge.

44.1 I submit that section 231 creates a constitutionally sanctioned process before the type of international agreement at issue in this matter binds South Africa. This involves first, executive action in the negotiating and signature of an international agreement, and then legislative action in approving any international agreement before it is binding on South Africa.

44.2 In effect, the Court by entertaining the premature challenge to the signature of the Protocol runs the real risk of prejudging and pre-empting the constitutional competence entrusted to Parliament to consider whether to approve this international agreement. Parliament should first be allowed to consider whether to approve the Protocol prior to this Court involving itself in the matter.

44.3 It is submitted that it would only be in exceptional circumstances when the Court would seek to pre-empt any consideration by Parliament, by entertaining a challenge to the signature of an

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international agreement on the basis that the agreement's content, if it came into effect and was binding on South Africa, would constitutes a violation of a right in the Bill of Rights.

44.4 The Applicant has not shown any exceptional circumstances as to why the Court should entertain the premature challenge of the President's conduct in signing the Protocol, which does not make the Protocol binding on South Africa, and which does not bring the Protocol into operation.

45. For the reasons set out above, I submit that the Applicant's challenge to the signature of the Protocol is premature and should be dismissed with costs.

NO LEGAL BASIS FOR THE CHALLENGE BROUGHT

The actions being challenged and the legal basis for the challenge

46. The relief sought by the Applicant in paragraph 1 of the notice of motion is in the following terms:

> "it is declared that the First Respondent's participation in suspending the SADC Tribunal and his subsequent signing of the 2014 Protocol on the SADC Tribunal is declared unconstitutional"

47. In paragraphs 71 to 73 the Applicant particularises the basis for the declaration it seeks when it alleges that:

> "The right of access to justice is guaranteed in our Constitution which has been extended to the SADC Tribunal.
>
> The right of access to justice was infringed when the Tribunal was suspended by the Summit. The Tribunal was suspended by the Summit held on 20 May 2011. The First Respondent was represented by the South African High Commission in Namibia.....
>
> The right continues to be infringed by virtue of the fact that the President signed the 2014 Protocol which limits the jurisdiction of the Tribunal between member states only."

48. It is clear from the above that the Applicant's challenge is two-pronged:

48.1 First, it challenges the President's participation in the suspension of the SADC Tribunal. Although, as pointed out above, it was in fact the High Commissioner who was the official present at the relevant Summit held on 20 May 2011.

48.2 Second, it challenges the subsequent signing of the Protocol by the President.

49. It is evident that the challenge to the constitutionality of the actions by the President is predicated on an alleged violation of the right of access to courts contained in section 34 of the Constitution.

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50. Although the overall basis of the challenge is that both the participation of the President in the suspension of the Tribunal and his signature of the Protocol have infringed or deprived South Africans of their rights to have access to the SADC Tribunal, these remain two different and distinct acts.

51. In paragraph 74 of the founding affidavit the Applicant also seems to challenge the President's conduct on the basis that he effectively deprived citizens of the right of access the SADC Tribunal without their prior consultation and consent. However, it is not clear whether the Applicant is seeking to argue that the President's actions are also unconstitutional for want of procedural fairness or whether this is simply argued to be part of the alleged breach of the right of access to justice. It is at least clear that there can be no legal basis for the Applicant to suggest that consent from all the citizens in the country is somehow a prerequisite to the exercise of public power in general or the specific public powers at issue in this matter. Moreover, the relevant actions that are the subject of challenge in this matter evidently constitute executive action, and there is therefore no obligation to consult with all or any South African citizens prior to taking the impugned actions.

52. I now turn to consider the allegation that the impugned actions of the President violated section 34 of the Constitution.

The ambit of section 34 of the Constitution

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53. Section 34 of the Constitution provides as follows:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

54. I am advised that the ambit of the right afforded by section 34 of the Constitution is limited to access to courts and tribunals or other forums within South Africa and it does not entail a right of access to international courts or tribunals that have been created by international organisations, such as the SADC Tribunal. Concomitantly, the obligations of the President and/or other state officials in terms of section 34 of the Constitution do not extend beyond the borders of South Africa. In particular the Constitution does not place an obligation on the executive to attempt to either create international tribunals that have jurisdiction to deal with complaints by South African citizens, or to ensure that citizens have access to international tribunals that already exist.

55. Furthermore, it should be pointed out, as discussed below, that all the extensive rights in the Bill of Rights are justiciable before South Africa's own courts, which are internationally recognised for their independence and commitment to constitutional democracy. Thus even if citizens are unable to approach the SADC Tribunal there can be no doubt that their rights under section 34 are fully protected by South Africa's domestic courts.

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56. I now turn to consider the specific actions that the Applicant alleges violated section 34 and the context within which those actions occurred.

The President's participation in the suspension of the SADC Tribunal did not violate section 34 of the Constitution

57. The SADC Tribunal is currently governed by the 2000 Protocol.

58. At its meeting in September 2009, the Summit instructed the SADC Committee of Ministers of Justice/ Attorneys-General ("the Committee of Ministers of Justice") to amongst other things review the roles, responsibilities and terms of reference of the SADC Tribunal. This instruction arose out of discussions and concerns in relation to the Summit's consideration of the Republic of Zimbabwe's ("Zimbabwe's") failure to comply with the decisions of the SADC Tribunal. The review by the Committee of Ministers of Justice was aimed at assisting the Summit to take an informed decision regarding the non-compliance of Zimbabwe to comply with the SADC Tribunal's decision, and Zimbabwe's claims in relation to the legitimacy of the Tribunal and its jurisdiction.

59. It is important to emphasise again, as discussed above, that in terms of Article 10(9) of the SADC Treaty, the Summit's decisions are taken by consensus.

60. Before the Summit took any decision in relation to the future role and

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responsibilities of the SADC Tribunal, the SADC Council of Ministers debated this issue frequently. I note that the Summit appointed the members of the SADC Tribunal on the recommendation of the Council of Ministers in terms of Article 4(4) of the 2000 Protocol.

61. The Summit received a recommendation from the Council of Ministers arising from its meeting held in August 2010 not to reappoint the Members of the SADC Tribunal whose term of office expired in August 2010, pending the Report on the SADC Tribunal from the Committee of Ministers of Justice.

62. At its meeting on 18 August 2010, the Summit, as indicated above, took a preliminary decision not to reappoint those Members of the SADC Tribunal whose terms of office were expiring that month for another five year term pending a final decision to be taken at the Extraordinary Summit (which was held in May 2011). Furthermore, the Summit decided to put in place a moratorium on the Tribunal considering any new cases, pending the May 2011 Summit, where the legal status and roles and responsibilities of the SADC Tribunal would be considered. The Summit also decided that a study should be undertaken to review the role and responsibilities of the SADC Tribunal.

63. The President was present at August 2010 Summit. The relevant decisions were not taken by vote but by consensus. Thus, the recommendation by the Council of Ministers was deliberated and debated until a general

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consensus was reached. The decision to place a partial moratorium on receiving new cases was viewed by the Summit as an acceptable compromise in light of the process that was already underway to review the roles, responsibilities and terms of reference of the Tribunal.

64. The view taken by the President after consultation with his advisors and all the relevant departments at this stage was that a partial and temporary moratorium on receiving new cases was necessary in order to best address the challenges being faced in relation to the SADC Tribunal and its powers and the concerns raised by certain Member States, including in relation to the jurisdiction of the Tribunal. Therefore, the President did not oppose the consensus view taken by the Summit on the recommendation of the Council of Ministers, which in any event was only to put in place a partial moratorium for a limited duration (until the May 2011 Summit).

65. The services of the World Trade Institute ("WTI") advisors were appointed to undertake a study on the role, responsibilities and Terms of Reference of the SADC Tribunal in November 2010. The WTI presented its report to the Committee of Ministers of Justice in Swakopmund on 14 and 15 April 2011.

66. On 20 May 2011, the Summit considered the study done by the WTI on the roles, responsibilities and Terms of Reference of the Tribunal and presented to the Committee of Ministers. The Summit mandated the

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Committee of Ministers of Justice to initiate the process of amending the 2000 Protocol and to provide a final report to the Summit in August 2012.

67. The Summit further considered the recommendation of the Council of Ministers regarding the re-appointment of the Members of the Tribunal and the moratorium on receiving new cases. The Summit approved the recommendation of the Council of Ministers not to reappoint the members of the SADC Tribunal whose term of office expired on 31 August 2010 and not to replace Members of the SADC Tribunal whose terms of office were due to expire on 31 October 2011. As discussed above, the Summit also put in place a moratorium on receiving new cases or hearing pending cases until the Protocol on the SADC Tribunal had been reviewed and approved.

68. As already mentioned above, the High Commissioner attended the Summit meeting of 20 May 2011 on behalf of the President. The decision made on 20 May 2011 was also made by consensus. For the same reason set out above in relation to the August 2010 meeting, the High Commissioner did not object to the consensus position on this issue. The consensus decision of the Summit took into account the interests of the majority of Member States on this issue.

69. As indicated above, section 34 of the Constitution only protects the right of access to domestic courts and not international courts or tribunals. It is therefore clear that neither the President nor the High Commissioner had

an obligation that stemmed from the Constitution to try and persuade the other Member States to ensure that the SADC Tribunal remained operational during the review process. Therefore, any participation in the Summit that suspended the Tribunal did not violate section 34 of the Constitution.

70. Moreover, the fact that for the last four years the SADC Tribunal has not been operational does not mean that South African citizens and others living in South Africa have been denied access to justice. South Africa has an independent judiciary and a model Constitution, with a Bill of Rights that protects fully the rights of citizens and foreigners alike. The South African courts can and do provide access to justice in South Africa for any whose rights have been violated. The decisions of the South African courts have received recognition by courts in other open and democratic societies. The Applicant has not demonstrated any failure or inadequacy of the South African courts to ensure the protection of the right of access to courts and the protection of human rights.

71. In the premises it is submitted that, the High Commissioner's participation in the May 2011 Summit and/or her lack of objection to the consensus decision taken by the Summit to suspend the Tribunal, did not violate the right of access to courts as guaranteed in section 34 of the Constitution. Similarly, the President's participation in the August 2010 Summit and/or lack of objection to the adoption of the decision by the Summit to place a

temporary and partial moratorium on the Tribunal hearing new cases pending the May 2011 Summit did not violate section 34.

The President's signing of the 2014 Protocol on the SADC Tribunal did not violate section 34 of the Constitution

72. As already mentioned and quoted above, the Summit in its meeting in August 2012 issued a Communiqué which recorded its decision in paragraph 24 that a new Protocol on the SADC Tribunal should be negotiated and that the SADC Tribunal's mandate should be confined to the interpretation of the SADC Treaty and Protocols relating to disputes between Member States.

73. The Committee of Ministers of Justice and the Council of Ministers negotiated the ambit of the jurisdiction of the SADC Tribunal extensively. February 2014 marked the finalization of the long process of negotiating the issue of the mandate of the SADC Tribunal when the Committee of Ministers of Justice approved a draft new Protocol on the SADC Tribunal and recommended it to the Council of Ministers and the Summit for further consideration. This draft protocol had taken into consideration previous concerns by the Council of Ministers and the Summit that the mandate of the SADC Tribunal was too broad. The draft Protocol thus provided for a more limited mandate.

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74. The Council of Ministers at its meeting of August 2014 considered and approved the new draft Protocol and the Council recommended it to Summit for further consideration, adoption and signature. The Summit at its meeting of 18 August 2014 considered, adopted and opened for signature the new draft Protocol on the SADC Tribunal. The SADC Communiqué of the decision of 18 August 2014 is attached to the founding affidavit as annexure "**FA1**".

75. The decision to adopt the new draft Protocol was taken by consensus decision by the Member States at the Summit.

76. The Applicant fails to appreciate that the manner in which decisions are taken at the Summit often requires a level of compromise between the different interests of Member States. This is the case in all international organisations made up of many sovereign states, which are required to reach consensus, or at least a majority decision, on various issues. It will be appreciated that this is particularly true in relation to the creation of an international tribunal. For such a tribunal to be created and to be given jurisdiction over certain states requires the consent of these states to the creation and jurisdiction of the tribunal. No one state can seek to unilaterally create an international tribunal which has jurisdiction over another. Therefore, the determination of the jurisdiction and powers of an international tribunal is by its very nature an exercise of reaching consensus between states.

77. The 2014 Protocol represents an indication of the current consensus in SADC, after much negotiation and consideration, as to the appropriate role and jurisdiction of the SADC Tribunal.

78. It was in this context that the President elected to sign the Protocol adopted by the Summit, and which represented the common view and decision of the SADC Member States.

79. However, as discussed more fully above, the challenge to the President's signature of the Protocol is premature:

79.1 The act of signing the Protocol by the President was a formal act which was done at the closing of the session, in accordance with Article 52, read with Article 53.

79.2 The Protocol makes plain that the President's signature is not meant to constitute South Africa's consent to be bound by the Protocol – that requires ratification in accordance with South Africa's own constitutional requirements.

79.3 In the circumstances, in signing the Protocol the President did not, and did not intend to, bind South Africa. The signature is simply a preliminary step. The signature did not bind South Africa to the Protocol, nor does it bind the President or the national executive

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to seek to ratify the Protocol by placing the Protocol before Parliament.

79.4 The President was alive to the fact that, given the terms of the Protocol, after signing the Protocol he would have an opportunity, together with the executive, to consider whether South Africa should seek to ratify the Protocol, thereby consenting to be bound by it. This would require the Protocol to be tabled before both houses of Parliament for their approval.

79.5 The President together with, *inter alia*, the Second and Third Respondents and their Departments are still re-examining the Protocol with the view to taking a decision whether or not to table the Protocol in Parliament for ratification. In the event that the Protocol is tabled in Parliament, there will be public participation.

80. Before the Protocol is ratified it would need to be approved by both houses of Parliament, which would hold public participation processes that would allow members of the public to make representations.

81. In light of the above, and given the relevant legal principles set out in relation to the nature of the obligation created by section 34 of the Constitution, it is submitted that the President's signature does not constitute a violation of section 34 of the Constitution.

82. I now turn to deal with each paragraph of the Applicant's founding affidavit *ad seriatim.*

AD SERIATIM RESPONSES

83. **Ad Paragraphs 1 to 4**

Save to deny that the facts contained in the founding affidavit are all true and correct and within the personal knowledge of the deponent, I do not take issue with the rest of the averments made in these paragraphs.

84. **Ad Paragraphs 5 to 10**

I do not take issue with the contents of these paragraphs.

85. **Ad Paragraph 11**

85.1 I note the purpose for which the application is brought. However, I deny that the application has any merit for the reasons that have already been set out above in this affidavit.

85.2 I deny that the relief sought as articulated in paragraphs 11.1 to 11.3 is the same as the relief set out in paragraph 1 of the notice of

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motion. The Applicant is only entitled to the relief it seeks in the notice of motion.

85.3 I repeat what I have said above in this affidavit in relation to the incompetence of the relief sought by the Applicant in its notice of motion.

86. **Ad Paragraphs 12 and 13**

86.1 I deny the averments made in this paragraph.

86.2 I reiterate that section 34 of the Constitution does not entail any right of access to international courts and tribunals. It also does not create any obligation on the executive to endeavor to protect the right of access to courts and tribunals for its citizens in every international forum where South Africa is a member state or a participant.

87. **Ad Paragraph 14**

I do not take issue with the contents of this paragraph.

88. **Ad Paragraph 15**

88.1 I deny the averments made in this paragraph.

88.2 The rights that citizens have in terms of the Protocol are rights created by the SADC Member States by mutual consensus and consent and the Member States have the power by consensus and consent to broaden or limit the mandate of the Tribunal.

89. **Ad Paragraph 16**

I do not take issue with the contents of this paragraph.

90. **Ad Paragraphs 17 and 18**

90.1 I deny that the signing of the Protocol infringed the South African citizen's rights of access to justice. I repeat what I have said above in this affidavit in this regard.

90.2 Furthermore, it should be borne in mind that the signature of the President does not limit the mandate of the SADC Tribunal. Rather:

90.2.1 The Summit decided by consensus that a new Protocol should be drafted and adopted to replace the current

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2000 Protocol that would limit the jurisdiction of the Tribunal to only entertain inter state complaints.

90.2.2 Although the relevant Protocol has been finalised, the Protocol will only come into force (and thereby replace the 2000 Protocol)[3] when, and if, the Protocol is ratified by 10 of the 15 Member States, including South Africa.

90.3 Save as aforesaid, I deny the averments made in these paragraphs.

91. **Ad Paragraphs 19 and 20**

I note the averments made in these paragraphs. However, I deny that there is any merit in the challenge brought by the Applicant against the Respondents in this case.

92. **Ad Paragraphs 21 to 27**

I do not take issue with the averments made in these paragraphs insofar as they correctly state the establishment of SADC, the Summit, the Council and the SADC Tribunal and the extent of the mandate of the SADC Tribunal under the 2000 Protocol and the 2014 Protocol.

[3] See Article 48 of the 2014 Protocol.

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93. **Ad Paragraph 28**

93.1 The suggestion as to the importance of the SADC Tribunal needs to be seen in context. The SADC Tribunal only became operational in November 2005 after its first members were appointed. 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. During this time, it only decided approximately nineteen cases.

93.2 I point out that South Africa has a model judicial system where the rights of citizens and foreigners who are present within South Africa are fully protected under the Constitution, and which protection is enforced by independent courts. Moreover, section 39(2) of the Constitution requires South African courts to have regard to international law in interpreting the Bill of Rights.

93.3 There is no reasonable basis to suggest that South African courts would not, or do not, provide full redress for any rights enshrined in the Constitution.

94. **Ad Paragraphs 29 to 32**

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I do not take issue with the contents of these paragraphs insofar as they correctly state the provisions of the SADC Treaty. I attach hereto a consolidated text of the SADC Treaty including amendments to date as annexure **"JS5"**.

95. **Ad Paragraph 33**

95.1 The provisions of the Treaty referred to do not, on their own terms, have anything to do with how SADC came into existence. SADC is a regional body, created by the mutual consent of its various Member States.

95.2 Save as aforesaid I deny the averments made in this paragraph.

96. **Ad Paragraphs 34 to 41**

96.1 I do not take issue with contents of these paragraphs insofar as they correctly state the sequence of decisions made by the Summit and are consistent with what I have said in this affidavit.

96.2 I point out however that annexure **"FA4A"** attached to the founding affidavit is not a record of the Communiqué of the Summit's decisions of August 2010. The Applicant has erroneously attached the May 2011 Communiqué. The August

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2010 Communiqué and the Record of Summit meeting have been attached to this affidavit as annexure "**JS1**" and "**JS1(a)**" respectively.

97. **Ad Paragraph 42**

I do not take issue with the averments made in this paragraph, save as is inconsistent with what has been stated above. I reiterate that prior to any ratification of the 2014 Protocol by South Africa, Parliament will first have to consider whether to approve the Protocol and will ensure that there is a public participation process.

98. **Ad Paragraphs 43 and 44**

I do not take issue with the contents of these paragraphs.

99. **Ad Paragraphs 45 to 47**

I do not take issue with the contents of these paragraphs insofar as they correctly state the contents of annexures "**FA5**" to "**FA7**".

100. **Ad Paragraph 48 to 48.2**

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100.1 I do not take issue with the contents of these paragraphs insofar as they correctly state the contents of annexure "**FA8**".

100.2 On 14 August 2014, subsequent to the receipt of the Applicant's letter of 8 August 2014, Mr Sello Mabelane of the Presidency forwarded the letter to Adv Andre Stemmet from DIRCO because it is one of the departments (together, *inter alia*, with Justice) involved in the President's participation in SADC. I attach hereto a copy of the email attaching the letter as annexure "**JS6**".

101. **Ad Paragraph 50**

101.1 I do not take issue with the contents of this paragraph. However, Justice has no record of receiving the letter dated 2 September 2014.

101.2 It appears that the letter may not have been received because, judging by the email addresses included in the letter, it was sent to officials who were no longer with Justice at that time. It also does not appear that the Applicant sent out any follow up letters to confirm whether this letter was received.

102. **Ad Paragraph 51**

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102.1 Save is consistent with what is stated in this affidavit, I deny the averments made in this paragraph.

102.2 As already mentioned above, the decisions made in relation to the Tribunal are made by consensus (general agreement) at the Summit.

102.3 I repeat what I have said above in this affidavit regarding the signature of the Protocol and participation in the decision making process of the Summit.

103. **Ad Paragraphs 52 to 59**

I do not take issue with the contents of these paragraphs insofar as they correctly state the provisions of the Constitution and the SADC Treaty. I point out that as provided for in the Protocol adopted by the Summit, the Protocol will come into force only once it has been ratified by 10 of the 15 Member States.

104. **Ad Paragraphs 60 to 60.5**

104.1 Although the Applicant has not mentioned the relevant Constitutional Court judgment in which reliance is placed for the averments in this paragraph, I do not deny them insofar as they

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are consistent with the Constitutional Court's jurisprudence and in particular its judgment in *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC).

104.2 The Constitutional Court's judgment in the above case made it clear that the section 7(2) does not impose an obligation to ensure that foreign states should meet the requirements of the Constitution of South Africa.

105. **Ad Paragraph 61**

105.1 I deny that section 34 includes a right of access to international courts or tribunals, such as the SADC Tribunal, and specifically deny that any decision by the Constitutional Court can be interpreted to suggest that section 34 entails a right of access to the SADC Tribunal.

105.2 In light of the Constitutional Court's judgment in *Kaunda*, there is no obligation on the government of South Africa to ensure the right of access to courts beyond the South African borders.

105.3 In particular, there is no constitutional obligation on the President to ensure access to international tribunals including the SADC Tribunal.

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106. **Ad Paragraph 62**

I do not take issue with the averments made in this paragraph. The Courts however, have not recognized an obligation on the government of South Africa to ensure access to the SADC Tribunal by South African citizens. Rather they have recognised that decisions by the Tribunal can be enforced in a South African court in the same way as other foreign courts' decisions can be enforced in South Africa.

107. **Ad Paragraphs 63 to 69**

I do not take issue with the contents of these paragraphs.

108. **Ad Paragraphs 70 to 76**

108.1 I deny the contents of these paragraphs insofar as they are inconsistent with what I have said above in this affidavit.

108.2 I repeat what I have said above in relation to the obligation of the President to ensure access to courts. I reiterate that there is no obligation on the President to ensure access to international courts and tribunals and that the impugned conduct of the President does not violate section 34 of the Constitution.

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108.3 For the reasons stated above, I further deny that there was any obligation on the President, prior to the impugned conduct, to either consult with, or obtain the consent of, South African citizens.

109. **Ad Paragraphs 77 to 82**

I repeat what I have said above in response to paragraphs 43 to 49 which raised the same issues raised in these paragraphs.

110. **Ad Paragraphs 83 and 84**

I do not take issue with the contents of these paragraphs.

111. **Ad Paragraphs 85 and 86**

I do not take issue with the contents of these paragraphs. I refer to what I have said above in relation to the letter of 2 September 2014.

112. **Ad Paragraphs 88 to 90**

112.1 The Applicant has not made any application for access to information in terms of the Promotion of Access to Information Act ("PAIA").

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112.2 I submit that absent an application in terms of PAIA or reliance on the Uniform Rules of Court, the Applicant's averments in these paragraphs are unfounded and fall to be rejected.

112.3 Furthermore, I confirm, as made clear in this affidavit, that there was no public participation process prior to the impugned decisions and/or actions taken by the President. There was also no obligation on the President to call for public participation prior to the exercise of his executive power in relation to the signature of the Protocol and prior to his, and the High Commissioner's, participation in the various Summit meetings, for the reasons more fully set out above.

112.4 I repeat what I have said above in this affidavit in regard to the issue of public participation, and that such participation will occur prior to the ratification of the Protocol, since this will require Parliament to approve the Protocol. During that parliamentary procedure there will be provision made for public participation.

112.5 I note that the Applicant has also purported to reserve its right to supplement its founding affidavit in relation to the issue of public participation once the Respondents have disclosed all relevant information.

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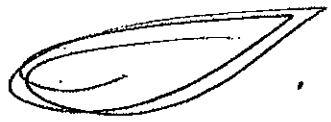
112.6 I deny that there is any obligation on the Respondents to disclose any information other than the information that is necessary to answer the case made out in the founding affidavit. I similarly deny that the Applicant is entitled to supplement its founding affidavit.

112.7 Save as aforesaid, I deny the rest of the allegations contained in this paragraph.

113. **Ad Paragraph 91**

I deny the averments made in this paragraph.

WHEREFORE the Respondents pray that the Applicant's application be dismissed with costs including the cost of two counsel.



DEPONENT

SIGNED AND SWORN TO BEFORE ME AT Pretoria ON THIS 16 DAY OF JULY **2015**, THE DEPONENT HAVING ACKNOWLEDGED IN MY PRESENCE THAT HE/SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, THE PROVISIONS OF GOVERNMENT GAZETTE R1478 OF 11 JULY 1980 AS AMENDED BY GOVERNMENT GAZETTE R774 OF 20 APRIL 1982, CONCERNING THE TAKING OF THE OATH, HAVING BEEN COMPLIED WITH.

Z.S.

COMMISSIONER OF OATHS

I HEREBY CERTIFY THAT THIS IS
A TRUE COPY OF THE ORIGINAL
ZAMOKUHLE PRAISE THABILE SOKHELA
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COMMISSIONER OF OATHS
Practising Attorney R.S.A.