

Law Society of South Africa and Others v the President of the Republic of South Africa and Others

Q and A

Who is SALC?

The Southern Africa Litigation Centre (SALC) is an independent regional human rights organisation based in Johannesburg. SALC was established in 2005 and has been promoting human rights and strengthening the rule of law for over ten years. SALC operates in ten SADC countries including South Africa. SALC is a small NGO with a committed staff complement that works with regional organisations and lawyers to bring cases of strategic value before domestic courts and the African Commission.

What is this case about?

This case is about the participation of the President in the decision of the SADC Heads of State and Government (the Summit) that suspended the operations of the SADC Tribunal in 2011. It is also about the President's signing of the 2014 SADC Tribunal Protocol. These two Executive decisions implicate the rights of the citizens of South Africa's to access justice at the SADC Tribunal. South Africa is a member of the Southern African Development Community (SADC). The SADC Tribunal was established in 2005 as a dispute mechanism with the ability to hear human rights complaints against Member States from individuals.

After a series of judgments from the Tribunal against the government of Zimbabwe brought by individual complainants, the SADC Summit took several steps starting in 2010 to suspend the operation of the Tribunal. Then in 2014, the Summit negotiated a new Protocol changing the jurisdiction of the Tribunal to include only disputes between Member States, removing the right of citizens of Member States to bring human rights complaints. The 2014 Protocol is not yet binding as not enough Member States have signed and ratified the agreement. South Africa has not yet ratified the 2014 Protocol.

The applicants in this matter are, therefore, challenging the President's participation in the above two decisions.

What were the events leading up to the case?

SADC was established in 1992. South Africa joined in 1995 after the President signed the Treaty and Parliament approved it.

The SADC Tribunal was an institution established under the original SADC Treaty. The SADC Summit negotiated a Protocol in 2000 that would lay out the terms and rules of the Tribunal. Not

enough Member States ratified that Protocol to bring it into force. The SADC Summit, using its amendment powers, integrated the SADC Tribunal Protocol into the SADC Treaty. This brought the Tribunal into operation.

On 18 November 2005, the Tribunal was inaugurated as a judicial body established to resolve disputes between Southern African states and between states and their citizens. A few years later, Zimbabwean farmers were victims of a government campaign to take back land from white farmers without compensation. During that campaign a number of farmers were severely assaulted, they were stripped of their properties and others died. Aggrieved with this turn of events, they launched a case at the SADC Tribunal for damages and compensation. The Tribunal found in their favour and ordered the Government to remedy the situation and compensate the victims. Zimbabwe refused to comply with the Tribunal's decision and the Tribunal held that Zimbabwe's termination, restriction and interference with its own courts' jurisdiction constituted a human rights violation. Zimbabwe's response was to embark on a contempt offensive against the Tribunal. It lobbied its counterparts for the abrogation of the Tribunal's jurisdiction, culminating first in the suspension of the Tribunal in 2011 and later the drafting of a new Protocol that would remove the Court's jurisdiction for individuals in 2014.

The suspension of the Tribunal by SADC leaders was followed by a decision to review terms and conditions of the Tribunal; they also froze reappointment or replacement of judges who staffed the Tribunal, and prohibited the Tribunal from taking any more cases. These decisions were reaffirmed in 2011. In 2012, the

Summit resolved that a new Protocol should be negotiated, limiting the jurisdiction of the Tribunal.

In 2014, the Protocol establishing the SADC Tribunal was revised to remove the Tribunal's power to hear disputes brought by citizens against states and its mandate was restricted to hear disputes between SADC Member States only. So far, this Protocol has not received enough signatures or ratifications to enter into force.

In 2015, SADC leaders approved a resolution to establish a new Tribunal, called the SADC Administrative Tribunal (SADCAT). The Administrative Tribunal has jurisdiction only to hear administrative matters between SADC states and SADC secretariat staff, while under the revised Protocol the SADC Tribunal will hear interstate disputes only. Neither the SADC Tribunal nor the newly created SADCAT will have human rights jurisdiction and individuals will no longer have direct access to them.

Who are the parties to the case?

The applicants are the Law Society of South Africa (LSSA), Luke Munyandu Tembani, Benjamin John Freeth, Richard Thomas Etherredge, Christopher Mellish Jarret, Tengwe Estate (Pvt) Ltd and Franc Farm (Pvt) Ltd. The second through seventh applicants are Zimbabwean persons who brought claims against Zimbabwe to the SADC Tribunal; after the Tribunal ruled in their favour, the Tribunal was promptly suspended.

The respondents are the President of the Republic of South Africa, the Minister of Justice of the Republic of South Africa, and the Minister of International Relations and Co-operation of the Republic of South Africa.

SALC and the Centre for Applied Legal Studies (CALS) are both admitted as *amicus curiae* in the case.

What are the applicants' arguments for why the President acted unlawfully?

The LSSA argues that the President's actions are unlawful for violating the provisions of the SADC Treaty. The Member States are bound by the SADC Treaty to promote democracy, human rights and the rule of law. In addition, the Treaty establishes certain requirements for the Tribunal such as the appointment of judges by the Member States, which the actions of the Summit violated. Furthermore, under the Constitution of South Africa, international agreements approved by the government have binding force on South Africa, and these obligations must be fulfilled reasonably. The LSSA argues that in this case, the President's actions were not reasonable and are without sufficient justification. Finally, the LSSA argues that the 2014 Protocol violates the binding international obligations stemming from the SADC Treaty itself. The authority to undo international obligations comes from Parliament. In this case, the Executive has tried to unilaterally undo these obligations, outside his constitutional powers and in a manner that constitutes unlawful procedural irrationality.

The second to seventh applicants argue that the President's conduct violates the rule of law and can be challenged as irrational, arbitrary and in bad faith. First, the actions of the President violate the SADC Treaty themselves, in that the Treaty mandates that the Tribunal exist and prohibits Member States from attempting to thwart the provisions of the Treaty and its purpose. Second, the President's signature on the 2014 Protocol was irrational as there was no appropriate justification or legitimate

government purpose to support the President's decision.

What is the South African government's argument for why the President acted lawfully?

The South African government argues the President's signature did not bind the country nor did it bring the new 2014 Protocol into force. The 2014 Protocol will only affect the rights of South Africans when the two-thirds of the Member States have signed and gone through their ratification processes; therefore, at this point, the President's actions have not deprived anyone of rights. Moreover, the 2014 Protocol will only become binding on South Africa when Parliament approves the new Protocol.

In addition, the State argues a court has very limited rights to intervene when the President's powers in international relations are involved. The President has wide discretion to act out of comity and to further South Africa's international relations in the region.

They also argue that the case was brought too late and without an adequate explanation for its lateness in relation to the 2011 suspension of the Tribunal. And it was brought too early in relation to the second part of the dispute because the 2014 Protocol has yet to be ratified by Parliament. The President's signature on the Protocol was not binding, "but merely signified that SA would consider whether it wished to ratify" it.

What was SALC's argument for why President Zuma's actions were unconstitutional?

SALC's position is that citizens of South Africa are entitled to access to justice under both article 34 of the South African Constitution and regional and international

law. Under the binding SADC Treaty, the citizens have been granted access to this right by Parliament. President Zuma has interfered with that vested right without any authorization from Parliament.

Additionally, denying individuals' access to an international tribunal is contrary to the trend across the globe to give relief on an international or regional level to individuals who cannot access such relief on a domestic level.

The ability to access justice and vindicate rights is essential to the values of democracy and the Constitution. It is a right that allows citizens to seek remedy for violations of their other rights.

What is CALS's argument for why President Zuma's actions were unconstitutional?

CALS argues that there is an obligation on the President to consult with the public prior to signing an international agreement. In failing to do this in the case of the 2014 Protocol, the President has acted unlawfully.

What does the limitation of the Tribunal's jurisdiction mean for Southern Africa?

The suspension of the Tribunal's operation and the adoption of the 2014 Protocol effectively eliminated the regional human rights court in the region of Southern Africa contrary to international and regional efforts to promote access to justice in the SADC region.

The steps taken by States in the region constitute a retrogressive step and further impediment to individuals' access to justice and effective remedies for human rights violations. The Tribunal was suspended at a time it had started establishing itself as a

well-respected international tribunal providing remedies and jurisprudence appropriate to the needs of SADC nationals. By dismantling the court, SADC Heads of States and Governments betrayed their commitment to fighting impunity and exposed themselves as proponents of human right violations and impunity of international crimes.

What is the current status of the case?

The case will be heard for the first time before the North Gauteng High Court on the 5-7 February, 2018.

Who funds SALC?

SALC is funded by several donors who are all listed in SALC's annual reports. SALC operates on a modest budget and its staff need to fundraise to support its existence. Donors have no input with regard to case selection or on the issues SALC chooses to work on. SALC does not and has never received any funds from the South African state to support its human rights and public interest work. SALC is governed by an independent board of trustees who also do not have input into the case selection process. SALC is transparent in its operations and its audited financial information including the names of its donors is publicly available.