IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no 20382/2015

In the application between:

LAW SOCIETY OF SOUTH AFRICA	First applicant
LUKE MUNYANDU TEMBANI	Second applicant
BENJAMIN JOHN FREETH	Third applicant
RICHARD THOMAS ETHEREDGE	Fourth applicant
CHRISTOPHER MELLISH JARRET	Fifth applicant
TENGWE ESTATE (PVT) LTD	Sixth applicant
FRANCE FARM (PVT) LTD	Seventh applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Third respondent
and	
SOUTHERN AFRICAN LITIGATION CENTRE	First *amicus curiae*
CENTRE FOR APPLIED LEGAL STUDIES	Second *amicus curiae*

SECOND TO SEVENTH RESPONDENTS' HEADS OF ARGUMENT
(Enrolled for hearing on 5-7 February 2018)

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A. Introduction

1. This case concerns the legality of the President's conduct in collaborating in the termination of the SADC Tribunal's human rights jurisdiction.

2. The President's conduct is attacked by the Law Society of South Africa ("the LSSA"), the first applicant, on the basis that it violates *inter alia* the constitutional right of access to justice.[1] It is attacked by the second to seventh applicants (collectively, "the Tembani applicants") – on whose behalf these heads of argument are filed – on the basis that it violates the rule of law (*inter alia* for violating the SADC Treaty and interfering retrospectively with vested rights), and is irrational, arbitrary and *mala fide*.[2]

3. Two *amici curiae* have been admitted. Both support the applicants. The first is the Southern African Litigation Centre ("SALC"). It intends to address regional and international law and its impact on the interpretation of section 34 of the Constitution (which entrenches the right of access to court).[3] SALC's papers acknowledge access to justice as a key aspect of the rule of law,[4] and observe that abolishing individuals' access to justice before the SADC Tribunal *compromises* (rather than enhances) South Africa's international status.[5] The second, *amicus* is the Centre for Applied Legal Studies

[1] Record vol 1 p 8 para 13.
[2] Record vol 3 p 249 para 3; Record vol 3 p 257 para 20.
[3] Record vol 11 p 1032 para 20.
[4] Record vol 11 p 1033 para 21.2.3
[5] Record vol 11 p 1033-1034 para 21.2.5.

("CALS"). CALS' position is that the President's failure to facilitate public participation and consultation before appending his signature is contrary to constitutional requirements.[6]

4. The common denominator of each of the above litigants' attack is that terminating the Tribunal's human rights jurisdiction is contrary to the rule of law. Abrogating an international court's existing human rights jurisdiction is, absent any coextensive constitutional amendment, self-evidently contrary to the rule of law. Doing so in the circumstances of this case is particularly lawless.

5. The factual circumstances, in short, are these. The abrogation of the Tribunal's jurisdiction occurred at the instance of Zimbabwe in response to the Tribunal's decisions against Zimbabwe.[7] The Tribunal held that *inter alia* Zimbabwe's termination, restriction and interference with its own courts' jurisdiction constituted a human rights violation.[8] Zimbabwe's response was to embark on a contempt offensive against the Tribunal.[9] Contempt proceedings against Zimbabwe therefore followed. The result was repeated findings by the Tribunal that Zimbabwe had defied its orders on a continual basis. A number of those whom the Tribunal's orders protected died, or were severely assaulted, and stripped of property.[10] The remedy under the SADC Treaty for Zimbabwe's continued defiance was a referral to the SADC heads of state for the imposition of sanctions against

[6] Record vol 1 p 1070 paras 4-5.3.
[7] Cowell (2013) "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction" 13(1) *Human Rights Law Review* 153 at 153-154.
[8] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 4 pp 346, 349).
[9] Record vol 3 p 253 para 14.
[10] Record vol 3 p 254 para 14; Record vol 10 p 1008 para 91.

Zimbabwe.[11] The Tribunal repeatedly ordered such referrals.[12] The SADC heads of states' response was, at best, arbitrary. Instead of sanctioning Zimbabwe, the SADC heads of state sanctioned the Tribunal.[13] This they did by effectively terminating the Tribunal's human rights jurisdiction. Thus human rights, access to court and the rule of law itself was abrogated. This is the core of the case.

6. That deed required unanimous consent by all heads of state.[14] President Zuma signified his consent by signing the 2014 Protocol. It is this Protocol which terminates the Tribunal's human rights jurisdiction at the instance of individuals, like the Tembani applicants. Their circumstances not only demonstrate the need for individual access to the Tribunal, but also the irrationality, arbitrariness and *mala fides* of terminating such access. For they are the farmers whose successful litigation against Zimbabwe before the Tribunal resulted in Zimbabwe's retaliation against the Tribunal.[15] The retaliation culminated in the signing of the 2014 Protocol by nine of the fifteen SADC heads of State.[16] While President Zuma's signature is the subject-matter of this application, similar applications have been lodged in domestic courts throughout the SADC region.[17] Commendably law societies across the region have stepped to the fore to do so.[18] Only in this application have the Tembani

[11] Article 33 of the SADC Treaty.
[12] Record vol 3 p 266 para 3.
[13] Record vol 3 p 254 para 14.
[14] Record vol 3 p 250 para 6. This the respondents themselves repeatedly proclaim: Record vol 7 p 626 para 4.1; Record vol 7 p 628 para 8; Record vol 7 p 646 para 59; Record vol 7 p 647 para 63; Record vol 7 p 648 para 64; Record vol 7 p 649 para 68; Record vol 7 p 652 para 75; Record vol 7 p 653 para 77; Record vol 7 p 657 para 88.2; Record vol 7 p 657 para 90.2.1; Record vol 7 p 663 para 102.2.
[15] Record vol 3 pp 252-254 paras 10-14.
[16] Record vol 7 p 637 para 34; Record vol 9 pp 1260-1261 para 20.
[17] Record vol 1 p 9 para 19.
[18] Record vol 1 p 9 para 19.

applicants (lacking the resources to do so elsewhere)[19] intervened, both to ensure relief which addresses their predicament and that of others similarly situated, and to place important factual material of which only they have knowledge before Court.

7. In this Court President Zuma opposes the Tembani applicants' case on only two bases. The first is prematurity. In short, the President contends that his signing of the Protocol which terminates the SADC Tribunal's human rights jurisdiction is an act without legal consequences,[20] and therefore not ripe for judicial scrutiny.[21] Yet the President reveals in his own papers that this Court's pronouncement on this matter is awaited to inform Government's next step.[22] The second ground of opposition constitutes a sweeping denial of irrationality, arbitrariness and *mala fides*.[23] In short, the respondents contend – through the mouth of the third deponent now saddled with the burden to depose to the President's defence[24] – that the President signed the Protocol as a sign of his respect for "certain Member States".[25] This is an obvious euphemism for Zimbabwe – and its insistence on terminating the SADC Tribunal's jurisdiction in respect of individual citizens.[26] This confirms, rather than contradicts, the Tembani applicants' case.

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[19] Record vol 10 p 1014 para 108.
[20] Yet he inconsistently pleads that the intention with the signature was to demonstrate respect for what SADC Member States have "concluded" (Record vol 9 p 859 para 27.4.1), namely negotiations resulting in human rights being sacrificed in favour of "respect" for Zimbabwe's wishes (Record vol 15 p 1271 para 51).
[21] Record vol 9 p 852 para 17.1.
[22] Record vol 9 p 856 para 20.8.
[23] Record vol 9 p 852 para 17.2.
[24] Record vol 9 p 1260 para 18.
[25] Record vol 7 p 648 para 64.
[26] Record vol 15 pp 1261-1262 para 23.

8. Accordingly neither of the President's bases of opposition is tenable, as we shall show further below. Our submissions follow the scheme set out in the above index.

B. Factual and procedural background

9. The surviving Tembani applicants' litigation history is largely also the history of the SADC Tribunal.[27] (Their case before it was one of the very first to be heard.) The history is set out in the annexure to their supporting affidavit in their intervention application before this Court, which (as the respondents now accept) stands as their founding papers.[28]

10. Initially the intervention application was strenuously opposed by the respondents. Bases of opposition were invoked[29] which were demonstrated in reply to be wholly contrived.[30] The respondents persisted in their opposition, however: they required the filing of heads of argument by both sides before eventually capitulating and conceding the intervention application. This obstructive abuse of court process by the respondents resulted in costs to the Tembani applicants, and delayed the litigation. Costs consequences apart, the significance of the respondents' belated capitulation is that the pleadings in the Tembani

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[27] Record vol 3 pp 252-256 paras 10-19.
[28] Record vol 9 p 848 para 3; Record vol 9 p 849 para 6.
[29] It was even suggested that the Tembani applicants were feigning their plight (Record vol 10 p 1014 para 108, referring to para 76.3 of the respondents' answering affidavit in the intervention application). This when they have lost their livelihoods, and some their lives (while many others have suffered but survived physical assault), through Zimbabwe's contempt for the Tribunal (Record vol 3 p 276 para 33).
[30] The Tembani applicants' replying affidavit filed in the intervention application is at Record vol 10 pp 975-1019. One of the respondents' bases of opposition was a specious appeal construct, and an affected "holistic reading" to attribute to them a case which is inconsistent with the Tembani applicants' founding papers. Not only the Tembani applicants' replying affidavit but also the respondents' subsequent answering affidavit demonstrate that these grounds of opposition were never genuine (see e.g. Record vol 9 p 868 para 44.2 and Record vol 9 p 877 para 55.3, which recognise the correct target of the Tembani applicants' attack; and Record vol 9 p 869 para 45.2, which shows that the appeal construct was always without foundation). The *amici*'s papers already confirmed the same (Record vol 11 p 1031 para 18; Record vol 11 p 1069 para 3).

applicants' previous litigation and the resulting judgments now serve *by consent* before this Court as their founding papers.

11. In what follows we provide an overview of those papers. We address separately those parts of the papers filed for the first time in this Court which are of particular importance to the Tembani applicants' case.

(1) <u>The SADC litigation commencing with *Campbell*</u>

12. The *Campbell* case commenced the SADC Tribunal's caseload. It also triggered Zimbabwe's retaliation against the Tribunal.[31] The case concerned commercial agricultural land in Zimbabwe, and involved some of the Tembani applicants. *Campbell* culminated in a declaration by the SADC Tribunal that Zimbabwe's ouster of its national court's jurisdiction violated the SADC Treaty, international human rights law and the right of access to justice – which forms an important component of the rule of law.[32]

13. The judgment articulated important principles of SADC law. They have been confirmed in subsequent cases by the Tribunal,[33] whose pronouncement on these principles are conclusive.[34] Neither this Court (nor any other domestic court in the region) is required to reconsider those pronouncements, nor is it (with respect) at large to do so.

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[31] Record vol 3 pp 253-254 para 14.
[32] The judgment is at Record vol 4 p 329*ff*.
[33] *Inter alia* in *Tembani v Republic of Zimbabwe* SADCT 07/2008 (Record vol 3 pp 292, 295-296); *Gondo v Republic of Zimbabwe* SADCT 05/2008 (Record vol 4 p 306).
[34] Article 16(5) of the SADC Treaty.

14. The principles of SADC law confirmed by the Tribunal are consistent with international law and South African law.[35] They include the well-established principle (recognised by *inter alia* the Constitutional Court)[36] that

> "the concept of the rule of law embraces at least four fundamental rights, namely, the right to have an effective remedy, the right to have access to an independent and impartial court or tribunal, the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation, the right to equal treatment before the law and the right to equal protection of the law."[37]

15. The Tribunal also confirmed a principle previously articulated by the African Commission in litigation concerning Zimbabwe.[38] It is that the rule of law is a necessary condition for human rights, and that it requires the existence of courts and tribunals to resolve disputes.[39]

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[35] South African caselaw cited by the Tribunal in its judgments include *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) and *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC); and international caselaw cited includes judgments by the International Criminal Court; the European Court of Human Rights; the Inter-American Court of Human Rights.

[36] *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at para 82: "The right of access to courts is an aspect of the rule of law."

[37] *Gondo v Republic of Zimbabwe* SADCT 05/2008 (Record vol 4 p 306); *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 4 p 354).

[38] *Gondo v Republic of Zimbabwe* SADCT 05/2008 (Record vol 4 p 310).

[39] *Ibid*, citing *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) Zimbabwe* 294/04, in which the African Commission held that Zimbabwe had violated Article 26 of the African Charter and held (at paras 118-120)

> "It is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that courts and tribunals resolve disputes both of a criminal and civil character free of any form of pressure or interference. The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law or the factual merits of the dispute. Without the rule of law and the assurance that comes from an independent judiciary, it is obvious that equality before the law will not exist.
>
> It is a vital requirement in a state governed by law that court decisions be respected by the State, as well as individuals. The courts need the trust of the people in order to maintain their authority and legitimacy. The credibility of the courts must not be weakened by the perception that courts can be influenced by any external pressure.
>
> Thus, by refusing to comply with the High Court orders, staying the deportation of Mr Meldrum and requiring the Respondent State to produce him before the Court, the Respondent State undermined the independence of the Courts. This was a violation of Article 26 of the African Charter."

It also found as a fact that Zimbabwe "persistently flouted the orders of its own High Court".[40]

16. Importantly, the SADC Tribunal also confirmed a legal principle of particular application to the current case, especially in the light of one of the President's pleaded points. The principle is that the SADC Treaty itself (through Article 4, which entrenches human rights and the rule of law) imposes "a legal obligation" on SADC "as a collectivity and as individual member States".[41] The Tribunal subsequently reiterated that Article 6(1) of the Treaty similarly imposes an obligation on member States of SADC to respect, protect and promote the "twin fundamental rights", being "the right of access to the courts and the right to a fair hearing".[42] Thus also this obligation rests on members States and their functionaries, and is not only exigible collectively against heads of State acting collectively *qua* SADC Summit.

17. In relation to its own legal status, the SADC Tribunal held that it is "one of the institutions of the organisation [*viz* the Southern African Development Community] which are established by Article 9 of the Treaty". The Treaty, in turn, is SADC's constitutive document (in other words, its *constitution*). The functions of the Tribunal are also entrenched in the Treaty itself. They "are to ensure adherence to, and the proper interpretation of, the provisions of the Treaty and the subsidiary instruments made thereunder, and to adjudicate on such disputes as may be referred to it."[43] Which disputes

[40] *Gondo v Republic of Zimbabwe* SADCT 05/2008 (Record vol 4 p 319).
[41] *Campbell v Republic of Zimbabwe* SADCT 02/07 (Record vol 4 p 323), emphasis added.
[42] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 4 p 355).
[43] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 4 p 345).

may be referred to it? The answer is "any dispute concerning human rights, democracy and the rule of law", the Tribunal held.[44] Not only disputes between States. As was the case with 80% of its caseload,[45] the dispute in which the Tribunal answered the crucial question as regards its own jurisdiction was indeed one between individuals and a State.

18. The source of the Tribunal's jurisdiction to determine disputes between individuals and States is, the Tribunal confirmed, Article 4(c) of the SADC Treaty itself.[46] This is reinforced by Article 6(1) of the Treaty; and comparative authorities confirmed and applied by the Tribunal. These *inter alia* confirm that depriving citizens of judicial protection is "inimical to the principle of the rule of law",[47] that the rule of law indeed requires "having access to the courts",[48] and that the rule of law precludes limitations on the international human right to have any claim brought before a court or tribunal restricting or reducing "the access left to the individual in such a way or to such an extent that the very essence of the right is impaired."[49]

19. Equally significant in the current context is the SADC Tribunal's adoption in SADC law the observation by Baroness Hale in *Jackson v Attorney-General*.[50] It is that

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[44] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 4 p 353), emphasis added.
[45] Record vol 6 p 562.
[46] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 4 pp 344-345).
[47] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 4 p 355), citing Woolf *et al De Smith's Judicial Review* 6th ed (Sweet & Maxwell, London 2007) at para 4–015.
[48] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 4 p 356), citing *Golder v UK* (1975) 1 EHRR 524 at para 34.
[49] *Campbell v Republic of Zimbabwe* SADCT 03/07 (Record vol 4 pp 356-357), citing *Philis v Greece* [1991] ECHR 38 at para 59.
[50] UKHL (2006) 1 A.C. 262.

> "The courts will treat with particular suspicion (and might even reject) *any* attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny".[51]

20. This destroys another one of the President's pleaded points: ripeness. As we shall show, the President's deponent contends that the impugned signature does not constitute a choate removal of the SADC Tribunal's individual jurisdiction. The signature, so it is ominously suggested, is "simply a preparatory step".[52] Therefore the application is premature, the President pleads. The short answer under SADC law is this. It is not only conclusive and concluded subversions of the rule of law which attract courts' scrutiny. Any type of conduct, even only an inchoate attempt, is justiciable. The reason is obvious, as *Campbell*'s sequelae shows: if an attempt becomes justiciable only after it is choate, then the attempt would have already destroyed an individual's ability to initiate judicial scrutiny.

(2) The *Campbell* case's sequelae

21. The *Campbell* judgment and the rest of the SADC Tribunal's caselaw were received by the South African, African and international legal community with acclaim.[53] Singular in its disdain was Zimbabwe, whose self-contradicting stance was transparent.[54] It was roundly

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[51] *Id* at para 159.
[52] Record vol 7 p 653 para 79.3.
[53] See *inter alia* Ndlovu "Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal" 2011(1) *SADC Law Journal* 63 at 79; Gathii "The Under-appreciated Jurisprudence of Africa's Regional Trade Judiciaries" 2010(12) *Oregon Review of International Law* 245 at 282; and Shay "Fast Track to Collapse: How Zimbabwe's Fast-Track Land Reform Program Violates International Human Rights Protections to Property, Due Process, and Compensation" 2012(27) *American University International Review* 133 at 136).
[54] As this Court held in *Government of the Republic of Zimbabwe v Fick* case nos. 47954/2010; 72184/2010; 77881/2009 at para 14 (Record vol 6 p 572 para 14).

condemned.[55] Its own High Court "openly rebuked"[56] Zimbabwe's "*ex post facto* official pronouncements repudiating the Tribunal's jurisdiction [a]s essentially erroneous and misconceived".[57]

22. Zimbabwe nonetheless continued to wage a campaign of publicised contempt and demonstrable defiance against the Tribunal.[58] This resulted in the repeated contempt proceedings to which reference has already been made.[59] The outcome of the contempt proceedings, in turn, was two separate referrals of Zimbabwe's recidivism to the SADC heads of State, comprising the SADC Summit.[60] The Summit was, however swayed by Zimbabwe to procure a review of the SADC Tribunal.[61] The purported review was a stratagem through which the Tribunal was frustrated, disabled, suspended and ultimately "dismantled".[62] It was in order to justify the suspension that Summit procured, at the instance of Zimbabwe,[63] that a consultant was appointed to conduct a review of the SADC Tribunal.

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[55] Record vol 3 p 268 para 11.
[56] De Wet (2013) "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" 28(1) *ICSID Review* 45 at 46.
[57] *Gramara (Pvt) Ltd v Government of the Republic of Zimbabwe* case no. HH169-2009; HC 33/09 (Record vol 6 p 594).
[58] Record vol 5 p 412 para 26; Record vol 5 p 413 para 27, recording the public statements by Zimbabwe's President, Mr Mugabe, and its Minister of Lands, Mr Didimus Mutasa, its then-Minister of Justice, Mr Patrick Chinamasa, and even its then-Deputy Chief Justice, Mr Justice Malaba.
[59] See also Record vol 2 p 161 fn 9; Record vol 5 p 477 fn 9, citing three examples: *Campbell v Zimbabwe* SADCT 11/2008; *Campbell v Zimbabwe* SADCT 03/2009; and *Fick v Zimbabwe* SADCT 01/2010.
[60] Record vol 5 p 412 para 26.
[61] Record vol 5 p 413 para 27.
[62] As Zimbabwe's efforts were described by the SADC Lawyers' Association, the Western African Bar Association, the Pan-African Lawyers' Union, the Coalition for an Effective African Court on Human and Peoples' Rights, the African Regional Forum on the International Bar Association and the International Commission of Jurists in a joint statement (Record vol 6 p 533 para 1).
[63] Record vol 5 p 413 para 27.

23. The respondents themselves concede that the Summit instructed the review precisely because of Zimbabwe's non-compliance with the SADC Tribunal's orders.[64] Summit thus purported to "review" the Tribunal, but without instituting any authorised legal recourse.[65] The parallels in South African domestic law, and consequences for the legality of this approach, are self-evident.[66]

24. The attempted review backfired spectacularly: the independent expert commended the Tribunal and recommended that its jurisdiction be retained.[67] This nonetheless did not inhibit Zimbabwe or any head of State from signing the 2014 Protocol at Zimbabwe's instance. Instead of justifying any interference with the Tribunal, the consultant appointed to conduct the review confirmed that the SADC Tribunal correctly applied the law. The consultant also recommended that the Tribunal be *strengthened*.[68] And instead of following the recommendation, the SADC Summit summarily suspended and thereafter materially terminated the Tribunal's jurisdiction. This without any amendment to the SADC Treaty itself.

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[64] Record vol 7 p 646 para 58.

[65] Article 26 of the 2000 Protocol on the SADC Tribunal authorises a review of SADC Tribunal decisions by the SADC Tribunal itself. Neither Zimbabwe nor the SADC Summit (nor any other entity or individual, for that matter) sought to invoke this provision.

[66] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para 98: the "rule of law is dead against" this type of executive "self-help", the Constitutional Court held. This was in the context of the President previously attempting to conduct a parallel review of findings by the Public Protector against the President in respect of public expenditure of hundreds of millions of Rand on his personal property. A pre-constitutional example of the executive government creating a review body to determine the validity of adverse court judgments is provided by the *Harris v Minister of the Interior* 1952 (2) SA 428 (A) and *Minister of the Interior v Harris* 1952 (4) SA 769 (A).

[67] Record vol 3 p 267 para 8.

[68] The consultant's report is duplicated in the record. It appears both at Record vol 2 pp 119-208 and at Record vols 5-6 pp 435-523. To facilitate ease of reference we shall cite in the footnotes which follow both instances where the report appears in the record.

25. Yet, as the SADC Tribunal previously held and the consultant's report confirmed, it is Article 4(c) of the SADC Treaty itself which is the source of the Tribunal's jurisdiction. This provision, furthermore, imposes a "binding obligation" not only on SADC, but also on its member States.[69] The consultant confirmed that "there is no reason to doubt the correctness of the rulings in *Campbell* and *Gondo* that Article 4(c) of the SADC Treaty constitutes an obligation binding on the SADC Member States."[70]

26. The report recommended that the SADC Tribunal's jurisdiction to hear disputes between individuals and member States be retained.[71] This is because, contrary to those comparable systems which do not provide for individual access, the SADC system provides no mechanism for individuals to request enforcement action of their complaints.[72] Without an enforcement mechanism, the report records, "the absence of an individual right of access to the SADC Tribunal would leave individuals with no recourse against their member States beyond national courts."[73] This could not be permitted, because "should national remedies be insufficient, individuals would be left without effective protection", the report observed.[74]

27. Thus, as a matter of law, both the right of access to court and the right to an effective remedy (each integral to the rule of law, as mentioned) are infringed if no individual access

[69] Record vol 2 p 127; Record vol 5 p 443.
[70] Record vol 2 p 129; Record vol 5 p 445.
[71] Record vol 2 p 146; Record vol 5 p 462. See also Record vol 2 p 152; Record vol 5 p 468, concerning the 2000 Protocol, in respect of which the expert report records "no need for any reform" of the relevant provisions – *viz* Articles 17 and 18, which govern "cases between persons and the Community (with any of these bringing the complaint)".
[72] Record vol 2 pp 145-146; Record vol 5 pp 461-462.
[73] Record vol 2 p 146; Record vol 5 p 462.
[74] Record vol 2 p 146; Record vol 5 p 462.

exists. The SADC Tribunal found conclusively that Zimbabwe is, as a matter of fact, a national jurisdiction within SADC where national remedies are indeed insufficient.[75] Yet the SADC Summit effectively terminated the SADC Tribunal's individual jurisdiction without providing an alternative mechanism.

28. In doing so, the SADC Summit acted contrary to the advice by the SADC Ministers of Justice and Attorneys-General.[76] The latter adopted the consultant's report and supported its recommendations.[77] That report also addresses a further aspect of SADC law bearing on this matter: consensus decision-making. This principle was invoked by the Tembani applicants in their intervention application. Surprisingly it is this self-same principle which the respondents seek to hide behind. This attempt is self-destructive. As the expert report records, what the principle of consensus decision-making actually means is that "any SADC Member State is able to veto a Summit decision unless the Treaty provides otherwise."[78] Thus President Zuma was not a victim of a consensus decision. The roles were inversed. He *created* consensus by <u>not</u> exercising his veto powers.

29. Apart from the SADC Ministers of Justice and Attorneys-General (who are the highest officials in SADC responsible for the administration of justice), also the SADC Lawyers and Judges supported the Tribunal's exercise of its human rights jurisdiction in respect of disputes between individuals and member States. They in fact recommended steps to

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[75] As we shall show, a previous Chief Justice of Zimbabwe has confirmed the same. It is, in any event, established on the papers.
[76] Record vol 3 p 268 para 10. See, too, Record vol 6 p 538, referring to the unanimous approval of the expert report by the senior legal officers, whose meeting preceded that of the Ministers of Justice/Attorneys General.
[77] Record vol 6 pp 525-530.
[78] Record vol 2 p 164; Record vol 5 p 480.

"increase access to justice by SADC citizens and/or residents"[79] and the strengthening of the-then "existing normative and institutional framework for human rights in the SADC legal structure".[80]

30. The SADC Tribunal's own judges eventually had occasion to comment on the Summit's actions against the Tribunal, describing them as "illegal and arbitrary", and "taken in bad faith".[81] This was after the SADC Tribunal was approached by some of the Tembani applicants to review and set aside the purported suspension of the Tribunal's jurisdiction.[82] But by the time the application could be lodged, the Tribunal was already disabled by the SADC Summit.[83] It therefore could not sit to rule on the legality of the executive arm of SADC's marginalisation of SADC's judicial arm. The *coup* was accomplished. The judges' observation was therefore made extracurially.

31. Having been unable to gain access to the Tribunal to rule on the interference with its jurisdiction, the Tembani applicants thereupon lodged a case in the African Commission.[84] This, too, resulted in a judgment which defeats the President's defence based on collective conduct.[85] South Africa did not, however, oppose the African Commission case.[86] It was

[79] Record vol 6 p 531 para 1, first bullet point.
[80] Record vol 6 p 531 para 2, first bullet point.
[81] Record vol 6 p 537; Record vol 6 p 540; Record vol 6 p 552. Record vol 6 p 543 records that "a stratagem has always been devised to defer" considering Zimbabwe's contemptuous disregard of the Tribunal's orders, and the reference by the Minister of Foreign Affairs of Zimbabwe at the close of a Summit meeting to the "complete dissolution of the Tribunal in its present form".
[82] This application comprises Record vol 4 pp 390-430. We have already referred to some of the facts summarised in the founding affidavit filed in that matter.
[83] Record vol 3 p 252 para 11; Record vol 3 p 266 para 5.
[84] The founding affidavit supporting the communication is at Record vol 3 pp 261-277.
[85] The judgment is at Record vols 9-10 pp 884-931.
[86] Record vol 10 p 892 para 32.

based on substantially the same causes of action which the Tembani applicants invoke in this application before this Court.[87] The African Commission case was initially instituted not only against South Africa and other individual SADC member states, but primarily against the SADC Summit itself.[88] However, the African Commission ruled that it only has jurisdiction over member States, and not also over international organisations (like SADC) and their organs (like the SADC Summit).[89] As a result the Tembani applicants' communication proceeded only against the SADC member States. At the conclusion of the proceedings, the African Commission held that it only had jurisdiction to decide whether there has been a violation of Articles 7 and 26 of the African Charter.[90] Thus the causes of action based on the rule of law, rationality, arbitrariness and *mala fides* (which are advanced in this application before this Court) were beyond its jurisdiction, the African Commission concluded. It interpreted the aforesaid provisions of the African Charter as entrenching only the right of access to justice before national courts. Because the SADC Tribunal is a sub-regional international court, the Commission considered that these provisions were not violated.

32. What the procedural history culminating African Commission proceedings demonstrates is that the SADC heads of State are not capable being held accountable collectively *qua* SADC Summit before any international forum. Therefore individual accountability of each head of State must necessarily exist at the national level. Otherwise there can be no

[87] Record vol 9 pp 886-887 paras 8-9.
[88] Record vol 10 p 884 para 1.
[89] Record vol 10 p 889 para 15.
[90] Record vol 10 p 926 paras 131-132.

accountability at all, contrary to Constitutional Court caselaw.[91] The African Commission indeed itself confirmed in the judgment on the Tembani communication that

> "the correct position of contemporary international law is that in appropriate cases, Member States of and international organisation could bear direct responsibility for wrongful acts and omissions of that international organisation especially where the rights of third parties are involved."[92]

33. Thus the respondents' stance before this Court is clearly incorrect. They contend for exclusive collective accountability on the part of all heads of State. But this the SADC Tribunal held, and the African Commission confirmed, is *not* the only basis on which obligations are imposed on member States. The African Commission, in turn, held that collective responsibility of heads of State (*qua* SADC Summit) does not exist in proceedings before it. But by that time the SADC Summit had long since succeeded in its aim: placing its own conduct effectively beyond judicial scrutiny by the SADC Tribunal. Thus the self-same conduct by the SADC Summit forming the cause of action before the SADC Tribunal rendered it impossible for the SADC Tribunal to adjudicate the cause of action. Because no right can be derived from a wrong, especially not in order to defeat the ends of justice, the prematurity point and the collective accountability points are defeated already by the procedural history.

34. They are in any event without merit. So, too, the other bases of opposition, as we shall now turn to show.

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[91] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para 1.
[92] Record vol 10 p 926 para 132.

C. Causes of action and bases of opposition

35. As mentioned, the Tembani applicants' causes of action are that the President's signature is contrary to the SADC Treaty itself; retrospectively affects vested rights; and is irrational, arbitrary and *mala fide*.[93] The procedural history set out above demonstrates the factual basis for these review grounds. They are established in the previous proceedings' pleadings, which – by consent order – stand as the Tembani applicants' founding papers.

36. In what follows, we shall show that the Tembani applicants' founding papers have not been met by the respondents. The respondents filed a comprehensive main answering affidavit in response to the LSSA;[94] a full answering affidavit in response to the Tembani applicants' intervention application;[95] a substantive answering affidavit in response to the Tembani applicants' founding papers;[96] and an equally extensive affidavit dealing with the *amici curiae*'s papers (the last confirmatory affidavits in respect of which were filed by the respondents only on 1 September 2017).[97] Yet none of these squarely addresses any of the issues invoked by the Tembani applicants.

(1) Violation of the SADC Treaty

37. The very first issue raised in the Tembani applicants' founding affidavit is not addressed at all by the respondents.[98] It involves the violation of the SADC Treaty itself.

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[93] Record vol 3 p 249 para 3.
[94] Record vol 7 pp 624-669.
[95] Not included in the record.
[96] Record vol 9 pp 846-881.
[97] Record vol 12 pp 1157-1191.
[98] It is raised *inter alia* at Record vol 3 p 249 paras 3 and 5; and Record vol 3 pp 270-272 paras 17-21. The latter is not traversed at all; and the former is traversed at Record vol 9 pp 868-871 paras 45 and 47. The President does not

38. The SADC Treaty establishes the SADC Tribunal is an integral organ of SADC.[99] The Treaty provides that it is the function of the SADC Tribunal to ensure adherence and the proper interpretation of the Treaty.[100] Decisions by the SADC Tribunal are "final and binding", the Treaty provides.[101] The Treaty also provides that "human rights, democracy and the rule of law" are founding principles, and that SADC and its Member States "shall act in accordance with" them.[102] Member States are precluded from "taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty."[103] Member States are, moreover, obliged to "cooperate with and assist institutions of SADC in the performance of their duties."[104]

39. Therefore any act which detracts from the SADC Tribunal's exercise of its human rights jurisdiction at the instance of individuals is inconsistent with the SADC Treaty itself, and violates the rule of law.[105] The President's signature of the 2014 Protocol is such act.

40. Any protocol to the SADC Treaty is a subordinate legal instrument. It may not permissibly emasculate a SADC organ established by the SADC Treaty itself. Even a purported

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attempt to dispute that the Tribunal is an essential SADC organ. He only contends that his "signature does not bring [the 2014 Protocol] into force" (Record vol 9 p 871 para 47.2). This misses the point. As we shall show in the body of the text which follows, the President is precluded by the SADC Treaty from taking any act which undermines the Tribunal and is obliged to take positive action to support the Tribunal.

[99] Article 9(1)(g) of the SADC Treaty.
[100] Article 16(1) of the SADC Treaty.
[101] Article 16(5) of the SADC Treaty.
[102] Article 4(c) of the SADC Treaty.
[103] Article 6(1) of the SADC Treaty.
[104] Article 6(6) of the SADC Treaty.
[105] Record vol 3 p 268 para 9.

amendment to the Treaty to achieve the SADC Member States' ambition to shrug off judicial scrutiny would have been legally repugnant.[106] But in this case it is not the SADC Treaty itself which was purportedly amended.[107] The desired result was illegally contrived through an attempt to repeal and replace the 2000 Protocol on the Tribunal by the 2014 Protocol.[108]

41. The President's signature, so the answering affidavit states, was "intended to demonstrate that South Africa was open to considering the ratification of a Protocol"[109] which terminates the human rights jurisdiction which the Tribunal conclusively held the SADC Treaty vested in it. Thus, at the very least, the signature – on the President's own papers – signals South Africa's participation in an "alarming" conspiracy initiated by "the Mugabe regime in Zimbabwe" to undermine an essential SADC institution's ability to enforce a fundamental SADC objective: compliance with the rule of law and human rights.[110]

42. Thus the first cause of action is clearly established – even on the President's own papers, which do not even attempt to refute the founding papers on this issue.

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[106] *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461, and the line of cases applying it. In *Kesavananda Bharati* the Supreme Court of India adopted the basic structures doctrine to deal with situations similar to the current one. The Court held that even though the Indian parliament had wide powers, it did not have the power to destroy or emasculate the basic elements or fundamental features of the constitution. It accordingly declared the attempt to do so unlawful. Applied to the current context, it is clear that the Tribunal is a fundamental feature of the SADC Treaty, which (as mentioned) serves as the constitution for SADC. Interfering with the Tribunal's jurisdiction is therefore contrary to the SADC Treaty.

[107] Record vol 3 p 273 para 26.

[108] Cowell (2013) "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction" 13(1) *Human Rights Law Review* 153 at 162.

[109] Record vol 9 p 860 para 27.5.

[110] Cowell (2013) "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction" 13(1) *Human Rights Law Review* 153 at 164.

(2) Retrospective interference with vested rights

43. Similarly the second issue is entirely unaddressed by the President's papers. It is common cause that the Tembani applicants and those whom they represent have vested interests in the SADC Tribunal's awards.[111] The enforcement of these awards is provided for in the Treaty itself,[112] and in the 2000 Protocol.[113] By frustrating and terminating access to the Tribunal, vested rights have been interfered with retrospectively. In all of this the President participated, as his papers essay.[114] Appending his signature to the 2014 Protocol was what the President "elected" to do,[115] thus contributing to the culmination[116] of "the long process".[117]

44. Thus also this review ground is clearly established, and nothing in the President's papers meets it. We stress that any defence in this regard was required to be made out in the answering affidavit; the President is not at large to seek now to do so in argument.

(3) Irrationality and arbitrariness

45. Irrationality (and perhaps with it arbitrariness) is the only review ground which the President purports to meet, apart from – fleetingly – *mala fides*.

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[111] Record vol 3 pp 255-256 paras 18-19; traversed at Record vol 9 pp 874-875 para 52, not denying the Tembani applicants' vested interests.
[112] Article 33 of the SADC Treaty.
[113] Article 32(4) and (5) of the 2000 Protocol on the SADC Tribunal.
[114] Record vol 9 pp 647-655 paras 63-78.
[115] Record vol 9 p 655 para 78.
[116] Record vol 3 p 351 para 8.
[117] Record vol 7 p 651 para 73.

46. As a matter of law, the situation is simple: if the President's signature cannot rationally be related to a legitimate government purpose authorised by section 231(1) of the Constitution and the SADC Treaty, then the President acted irrationally.[118] In the Constitutional Court's judgment on the SADC Tribunal it held that what the "Constitution promotes" is "democracy, human rights and the rule of law".[119] The SADC Treaty similarly entrenches these principles, and also imposes an obligation on Member States to promote them.[120]

47. The President's signature cannot be connected to the promotion of any of these principles. In none of the answering affidavits filed on behalf of the President has any of these principles been invoked. Nowhere has it been suggested that signing the 2014 Protocol can conceivably be connected to any of these principles.

48. Factually, the irrationality of the signature is therefore self-evident.[121] What is more, instead of supporting the Tribunal, and at the instance of the violator of the Tribunal's orders, the Tribunal's jurisdiction was signed away – contrary to the advice of the Ministers of Justice and Attorneys-General, and contrary to the recommendation by the independent expert appointed to conduct a review on the Tribunal.[122]

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[118] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 51, holding that where a "decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved"; *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 85, cited by this Court in the context of the rationality of withdrawal from an international treaty in *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP) at para 64; and *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at paras 79-80, holding that rationality is an entry-level requirement for any exercise of public power – also the power to engage in foreign relations.

[119] *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at para 39.

[120] Articles 4 and 6 of the SADC Treaty, to which we have already referred.

[121] Record vol 3 p 273 para 26.

[122] These and other common-cause facts establishing irrationality are summarised at Record vol 15 p 1279 para 72:

> "It is thus common cause *inter alia* that SADC's decision culminating in the signing of the Protocol is
>
> (a) contrary to the advice of an independent expert engaged by SADC;

49. This is clearly arbitrary and irrational. As academic commentators observed, "*the SADC member States lacked the political will to take action against Zimbabwe. In fact, not only did the Summit refrain from public criticism or sanctions, but it also effectively rewarded Zimbabwe's recalcitrant behaviour by giving in to its demand that the Tribunal be suspended and the SADC Treaty [sic] amended in a manner that will in future only provide for inter-State complaints.*"[123] The "clear illegality"[124] is in fact worse, because it is not the SADC *Treaty* which was purportedly amended, but merely the subordinate *Protocol* on the SADC Tribunal.

50. It is therefore indeed (at the very least) irrational to even merely append a signature to a protocol which impedes the SADC Tribunal's jurisdiction. Particularly in circumstances where no alternative has been provided to people with vested rights before the Tribunal, and without consulting them. Nor can there be any rational justification for ousting access to the Tribunal to the bearers of human rights. How is this fundamental element of the Treaty to be enforced? Exclusively in domestic courts? Firstly, that would be entirely

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(b) inconsistent with the recommendation by the Council of Ministers of Justice;
(c) contrary to statements by the SADC legal community;
(d) strongly criticised by the then-judges of the SADC Tribunal;
(e) inconsistent with the SADC Treaty itself;
(f) contrary to each SADC member state's duty to co-operate with, assist and strengthen SADC institutions like the Tribunal;
(g) a manifestation of member states like South Africa having sided with the violator (Zimbabwe) instead of enabling the Tribunal to give effect to its judgments violated by Zimbabwe; thus granting effective immunity from the Tribunal's orders, and allowing Zimbabwe to continue with impunity to implement measures held by the Tribunal to be in violation of international law;
(h) intended to sanction the Tribunal for its rulings against Zimbabwe, instead of sanctioning Zimbabwe for its contempt of the Tribunal's orders;
(i) the sequelae of Zimbabwe's President's and other Cabinet members' public attacks on the Tribunal; and
(j) obstructive to achieving the objectives of SADC."

[123] De Wet (2013) "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" 28(1) *ICSID Review* 45 at 58.
[124] *Ibid.*

contrary to the SADC Treaty – and indeed the dual obligation of South Africa under international *as well as* domestic law. Secondly, on the facts it has proved impossible. Zimbabwe, the procurer of the Tribunal's demise, has already ousted its domestic courts' jurisdiction to entertain certain human rights violations.[125] The 2014 Protocol completes the ouster of human rights jurisdiction. This is a matter which was either entirely absent from the President's mind, or which he condoned. His answering papers do not explain which of the scenarios apply. They fail to address it altogether. Such "rationale" as the President's answering papers now contrive does no more than evade.

(a) *Respondents' answering affidavit filed in response to the LSSA*

51. The respondents' main answering affidavit provided no rationale for the President's signature. All it did was to provide the "context" in which "the President *elected* to sign the Protocol".[126] What this "context" shows is that the SADC executive reached

[125] Record vol 15 p 1274 para 59. For a summary of the situation by a former Chief Justice of Zimbabwe, see Gubbay "The Progressive Erosion of the Rule of Law in Independent Zimbabwe" *Third International Rule of Law Lecture: Bar of England and Wales* (delivered on 9 December 2009) at 25:

> "The persistent onslaught suffered by the rule of law and democracy in Zimbabwe cannot be underestimated. Legality and constitutionality have been cast aside. Forces of violence, intimidation and disorder have been unleashed, and allowed to prevail, particularly, but certainly not exclusively, in the implementation of the fast-track land reform programme. A programme that has all to do with power politics; and nothing to do with the professed continuation of the liberation struggle to bring about economic emancipation for the landless majority. The timing of its introduction, after a delay of two decades since independence, proves the point. The law enforcement agencies have either actively collaborated in these lawless activities, or simply declined to afford protection, sanctuary and good order, in the fulfilment of their fundamental duties.
>
> There is urgent need to witness real progress on the part of the inclusive government on critical issues like restoring the rule of law, adhering to international treaty obligations, respecting human rights and guaranteeing freedom of speech, and freedom of assembly and association. Law enforcement agencies will have to be overhauled so that they may become professional, politically neutral forces that acknowledge the human rights of all Zimbabweans, and enforce the law on a fair and impartial basis. Sham politically motivated prosecutions must cease. So must the unlawful detentions, arrests, torture, intimidation and harassment, of human rights defenders and independent journalists. New private media should be licensed and international journalists allowed to practice openly."

[126] Record vol 7 p 653 para 78.

"consensus" on the termination of the Tribunal's jurisdiction to hold the executive to account for human rights violations at the instance of individuals. This is not a legitimate rationale. Yet consensus decision-making is the refrain echoed throughout the respondents' papers.[127]

52. There is only one instance where the initial answering affidavit provides any disclosure of the "reason" for South Africa "not object[ing] to the consensus position".[128] It is advanced in respect of the antecedent 20 May 2011 decision, which "was also made by consensus".[129] The reason is, the answering affidavit records, "the same" as "set out above in relation to the August 2010 meeting".[130] The August 2010 meeting, in turn, is described as reaching a "compromise" interim position, whereby a "partial moratorium for a limited duration" was imposed.[131] The suggested rationale for this executive imposition was "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."[132]

53. More accurately, what was raised was a single concern and it was raised by a single state. The concern was "jurisdiction" and the State was Zimbabwe. But even were mixed reasons

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[127] Record vol 7 p 626 para 4.1; Record vol 7 p 628 para 8; Record vol 7 p 646 para 59; Record vol 7 p 647 para 63; Record vol 7 p 648 para 64; Record vol 7 p 649 para 68; Record vol 7 p 652 para 75; Record vol 7 p 653 para 77; Record vol 7 p 657 para 88.2; Record vol 7 p 657 para 90.2.1; Record vol 7 p 663 para 102.2.
[128] Record vol 7 p 649 para 68.
[129] Record vol 7 p 649 para 68.
[130] Record vol 7 p 649 para 68. This paragraph goes on to aver, but without providing any factual basis for the bald assertion, that the "consensus decision of the Summit took into account the interests of the majority of Member States on this issue." It is meaningless to assert that "interests … on this issue" was taken into account. What is meaningful, however, is the implied concession that human rights, accountability and the rule of law were *not* taken into account. Nowhere does any of the respondents' answering affidavits assert that these considerations were taken into account – whether by Summit or by the President or those acting on his behalf.
[131] Record vol 7 p 648 para 64.
[132] Record vol 7 p 648 para 64.

to have operated on the purported rationale, a single bad reason vitiates.[133] Zimbabwe's own High Court was constrained to find that the jurisdictional "concern" was an *ex post facto* executive construct devoid of any merit. It was a ruse. Thus the only rationale advanced in the main answering affidavit is vitiated.

54. The lack of any objectively justifiable rationale for the President's signature is, however, revealed by the main founding affidavit contending that "the signature of the President does not limit the mandate of the SADC Tribunal".[134] "Rather",[135] so the answering affidavit emphatically states, "[t]he Summit decided by consensus that a new Protocol should be drafted and adopted to replace the current 2000 Protocol that would limit the jurisdiction of the Tribunal to only entertain state complaints".[136] This is irrational for being circular. Consensus exists *because* the President agreed. The President therefore cannot rationally agree because agreement exists. His agreement *precedes* the consensus which is invoked as the basis for his agreement. Conversely, had the President exercised his veto power, there would *not* have been consensus. Thus the President's support was a *conditio sine qua non* for consensus. Yet he raises consensus as rationale.

55. The main founding affidavit also concedes the absence of any public participation process.[137] Thus, despite the answering affidavit itself referring to the SADC litigation

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[133] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) at para 34; *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd* 2016 (3) SA 1 (SCA) at para 40; *Patel v Witbank Town Council* 1931 TPD 284 at 290.
[134] Record vol 7 pp 657-658 para 90.2.
[135] Record vol 7 pp 657-658 para 90.2.
[136] Record vol 7 pp 657-658 para 90.2.1.
[137] Record vol 7 p 667 para 112.3.

identified above, and some of the cases by name,[138] none of the named litigants has been permitted to make representations to the President on his proposed signature. Mr Fick, for instance, is a South African citizen. It is his case which the answering affidavit itself expressly cites as trigger for Summit's decisions.[139] And it is because of Summit's "consensus" that the President signed.

56. Circularity (and therefore *substantive* irrationality) apart, this also establishes *procedural* irrationality – on the President's own papers.[140] Procedural irrationality is an aspect identified by other parties as their main focus.[141] It also forms part of the rationality review ground, invoked by the Tembani applicants.

57. The Tembani applicants' papers demonstrate that even if it is correct that the President was not required to obtain the "consent" of "all the citizens in the country" (as the main answering affidavit unjustifiably and inaccurately attempts to parody the LSSA's case),[142] then a confined group of individuals with vested rights existed. These individuals and their circumstances were either known or readily ascertainable. Yet not even they were

[138] Record vol 7 p 630 para 14.9.5.
[139] Record vol 7 p 630 para 14.9.5.
[140] *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) at para 34 ("It follows that both the process by which the decision is made and the decision itself must be rational") and para 36 ("The means for achieving the purpose for which the power was conferred must include everything that is done to achieve that purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred"); *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at paras 50-51; *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) at para 69 (not only the merits of executive action, but also the process by which it was taken may be "impeached for want of rationality"); *eTV (Pty) Ltd v Minister of Communications* 2016 (6) SA 356 (SCA) at paras 38-42, citing comparative authority on the importance of consultation (*R (on the application of Moseley) v Haringey London Borough Council* [2014] UKSC 56); *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP) at paras 64-71; Murcott (2013) "Procedural fairness as a component of legality: is a reconciliation between Albutt and Masetlha possible?" 130(2) *South African Law Journal* 260-274.
[141] The LSSA and CALS.
[142] Record vol 7 p 644 para 51.

approached by the President or anyone on his behalf at any stage during "the long process".[143] Instead, the President relied on "[t]he consensus decision of the Summit", which in turn "took into account the interests of the majority of Member States on this issue".[144] The interests of right-bearers under the Treaty and the Tribunal's orders who were the victims of human rights abuses were *not* taken into account – nor the rule of law, the South African Constitution, or the Constitutional Court's judgment in *Fick*.[145]

(b) *Answering affidavit filed in response to the Tembani applicants*

58. The answering affidavit filed in response to the Tembani applicants, who specifically challenge the President's signature on the basis of a lack of rationality, provides no better rationale.

59. It is, firstly, deposed by a person holding an *acting* position in the Department of International Relations and Cooperation,[146] not the President himself or even any official in the Presidency. The deponent to that affidavit readily concedes that he deposes to facts which had "occurred prior to [his] appointment".[147] He openly admits that he relies on "information provided to [himself]".[148] He does not, however, disclose his source. It is not stated that the President is his source, or that the President provided any input on the affidavit at all. Nor does the President's confirmatory affidavit suggests that there has ever

[143] Record vol 7 p 651 para 73.
[144] Record vol 7 p 649 para 68.
[145] Record vol 15 p 1262 para 22.
[146] Record vol 7 p 847 para 1.1.
[147] Record vol 7 p 847 para 1.4.
[148] Record vol 7 p 847 para 1.4.

been any input by the President.[149] Nor does he seek the admission of the undisclosed hearsay parts of his affidavit, as is required.[150] This is because the requirements for the admission of hearsay are clearly not met.[151] The answering affidavit is therefore inadmissible,[152] and in any event fails to raise any material dispute of fact.[153] (This despite the replying affidavit in the intervention application already identified the factual dearth in

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[149] The President's confirmatory affidavit is at Record vol 10 pp 943-945. The only other confirmatory affidavit is at Record vol 10 pp 946-948. The latter is deposed by the Chief Director: International Legal Relations of the Department of Justice and Constitutional Development. It only confirms the contents of the answering affidavit "insofar as they refer or pertain to the Second Respondent [the Minister of Justice and Constitutional Development], the Department and its policies, and me" (Record vol 10 p 947 para 6). Although two further confirmatory affidavits were filed as late as 1 September 2017 by the respondents, no further supporting or confirmatory affidavits were filed in respect of the affidavits filed in response to the Tembani applicants. This despite the Tembani applicants' replying affidavit explicitly demonstrating the impermissible hearsay nature of the respondents' papers (Record vol 15 pp 1259-1260 para 17).

[150] Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 provides that "[s]ubject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings."

[151] Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 only permits the admission of hearsay evidence in the following circumstances

> "(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
> (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
> (c) the court, having regard to
> (i) the nature of the proceedings;
> (ii) the nature of the evidence;
> (iii) the purpose for which the evidence is tendered;
> (iv) the probative value of the evidence;
> (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
> (vi) any prejudice to a party which the admission of such evidence might entail; and
> (vii) any other factor which should in the opinion of the court be taken into account,
> is of the opinion that such evidence should be admitted in the interests of justice."

[152] Record vol 15 p 1260 para 17.

[153] *Wright v Wright* 2015 (1) SA 262 (SCA) at paras 15-16

> "It is well established that in application proceedings the affidavits take the place of both the pleadings and the essential evidence to be led at trial. The deponent to an affidavit is required to set out the source of his or her information. Hearsay evidence is inadmissible, save in urgent applications and where a court in its discretion permits such evidence in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988. Where a respondent in motion proceedings seeks to raise genuine disputes of fact it must do so through admissible evidence. A court will not permit factual disputes to be raised through inadmissible evidence where admissible evidence is readily available. Litigants are required to seriously engage with the factual allegations they seek to challenge and to furnish not only an answer but also countervailing evidence, particularly where the facts are within their personal knowledge.
> … a genuine dispute of fact on material aspects can only be raised through a fully motivated answer and/or countervailing evidence where the facts are peculiarly within a party's knowledge."

Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) para 56; *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at para 13.

the answering affidavit.[154] Subsequently, when the main answering affidavit was filed many months later in response to the Tembani applicants' case, the factual version remain equally bare.)[155] The President's formal confirmatory affidavit does not save the answering affidavit.[156]

60. These defects apart, the answering affidavit also fails in its own terms to justify the President's impugned signature. It again resorts (as did the answering affidavit in response to the LSSA) to "contextualise the President's decision to sign the Protocol within the context" of policy "more broadly".[157] Nowhere is it stated, however, that this "context" was as much as considered by the President. His confirmatory affidavit does not say so. What the President is said to have taken "into account" is only the fact that the SADC Summit has since 2012 approved the negotiation of a Protocol that would change the nature of the SADC Tribunal to only receive state complaints."[158]

61. Only two considerations are identified as grounds on which "the President's decision to sign the Protocol was based".[159] The first is "[t]he recognition that the negotiations for the Protocol had been concluded".[160] Therefore, "out of comity and mutual respect for SADC

[154] Record vol 10 p 1007 para 88.
[155] For the Supreme Court of Appeal's criticism of a similar approach adopted by the Presidency in defending its support of Zimbabwe, see *President of the Republic of South Africa v M & G Media Ltd* 2011 (2) SA 1 (SCA) at *inter alia* paras 37-38.
[156] Record vol 10 pp 943-945, which merely make formal recordals and then conclude by the formulaic submission "I confirm the contents of the affidavit of Kgabo Elias Mahoai insofar as they refer or pertain to me, and to the policies of the Presidency".
[157] Record vol 9 p 857 para 26.
[158] Record vol 9 p 589 para 27.3.
[159] Record vol 9 p 859 para 27.4.
[160] Record vol 9 p 859 para 27.4.1.

and the member states of SADC",[161] the President signed. As mentioned, human rights, constitutional constraints, the rule of law and the SADC Treaty itself were not considered.[162]

62. The second consideration on which the President's decision to sign the Protocol was "based" is another "fact" repeated from the main answering affidavit. It is that the Protocol was subject to ratification.[163] Therefore, so the respondents argue, "the President's signature would not bind South Africa".[164] It was, the answering affidavit *now* contends, "not intended to bind South Africa".[165] This is not the effect of section 231(3) of the Constitution.[166] It provides that a treaty like the Protocol indeed binds South Africa on its mere signature. Thus the rationale now advanced for the signature is another own goal. It created an effect which the President's deponent now avers he did not intend. This means that the signature is indeed irrational and arbitrary.[167] This is because there is no connection between intention and effect.

63. Nor is there any connection between the intention (expressing comity and respect for SADC and its member states) and the empowering provision (section 231(1) of the Constitution, which authorises the President to sign international instruments). It is

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[161] Record vol 9 p 859 para 27.4.1.
[162] Record vol 15 p 1261 para 22.
[163] Record vol 9 p 860 para 27.4.2.
[164] Record vol 9 p 860 para 27.4.2.
[165] Record vol 9 p 860 para 27.4.2.
[166] Section 231(3) reads
> "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."

[167] *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC) at paras 49-50.

section 84(2)(h) and (i) of the Constitution which confer on the President the responsibility for diplomatic recognition, comity, respect or graces. These provisions authorise the President to receive and recognise foreign diplomatic and consular representatives, and appointing ambassadors, plenipotentiaries and diplomatic and consular representatives. Furthering diplomatic relations is *not* a constitutionally-authorised purpose to be fulfilled through signing treaties under section 231(1) of the Constitution.

64. It follows that the conclusion which the deponent seeks to draw from the two above grounds (namely that "therefore" the "President's signature was intended to demonstrate that South Africa was open to considering the ratification of a Protocol that represented the outcome of the collective, multilateral, negotiations of the SADC members state [sic]") does not follow.[168] But even were it otherwise, the conclusory rationale begs the question. The question is *<u>why</u> was South Africa open to considering the ratification of the Protocol?* If the answer is because signature is insignificant, then no rationale exists for executing it. If it is purposeless, no purpose is served by the act of signing the Protocol. If the answer is that signature confers "respect" on the process (of terminating the SADC Tribunal's individual jurisdiction) and those initiating it (Zimbabwe, whose own High Court held that the rationale for the process was contrived), then it is unauthorised by section 231(1) of the Constitution and contrary to the rule of law – for being irrational, unauthorised, and repugnant to an essential element of the rule of law: access to justice.[169]

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[168] Record vol 9 p 860 para 27.5.

[169] *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at para 21. At para 60 the Chief Justice held that "[t]he rule of law is a foundational value of our Constitution and an integral part of the Amended Treaty. And it is settled law that the rule of law embraces the fundamental right of access to courts in s 34 of the Constitution" (footnotes omitted).

65. It further follows that the equally conclusory denial of *mala fides* on the aforegoing bases is also unavailing.[170] The President's signature did *not* "ensure respect for an institution", as the respondents argue.[171] It "severely undermined" a crucial SADC institution, the Tribunal.[172] In doing so it detracted from SADC's own stature and institutional accountability, and violated the SADC Treaty itself. Nor is it suggested that any of the six states which did not sign the Protocol undermined "the ongoing political and economic integration" of SADC or conveyed their disrespect for SADC or a SADC Member State by not signing the 2014 Protocol.[173] Therefore the contention that the President's signature "furthered" these considerations by signing the Protocol is unsubstantiated and unfounded.[174] It is of a piece with the Presidency's previous unsuccessful attempt to invoke diplomatic, political and policy casuistry to defend it bowing to Zimbabwe.[175] And it is inconsistent with the Constitutional Court's recognition in *Fick* of the objectives of SADC.

66. Indeed, the answering affidavit's reference to the Constitutional Court's judgment in *Fick*[176] is yet another spectacular own goal and *volte face*.[177] *Fick* has been invoked by the Tembani applicants precisely because it defeats the respondents' attempt to defend the President's participation in terminating the Tribunal's individual access. The

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[170] Record vol 9 p 861 para 27.8.
[171] Record vol 9 p 861 para 27.8.
[172] De Wet (2013) "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" 28(1) *ICSID Review* 45 at 58.
[173] Record vol 15 p 1270 para 49.
[174] Such considerations as are legitimate "has to be achieved *through* the guarantee of human rights, democracy and the rule of law" (De Wet (2013) "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" 28(1) *ICSID Review* 45 at 46, emphasis added).
[175] *President of the RSA v M & G Media Ltd* 2015 (1) SA 92 (SCA) at paras 29-30.
[176] Record vol 9 p 859 para 27.3.
[177] As the Tembani applicants pointed out in their replying affidavit in the intervention application, the respondents pleaded that "the Constitutional Court's judgment in *Fick* … [is] irrelevant to the constitutionality of the President's actions" (Record vol 10 p 1006 para 85, quoting para 60.1 of the answering affidavit in the intervention application). See, too, Record vol 15 p 1267 para 40.

Constitutional Court's judgment in *Fick* in fact demonstrates the rationale for individual access to the SADC Tribunal. The Chief Justice identified the objectives of SADC.[178] It is, the Constitutional Court confirmed, in order to "ensure that no SADC Member State is able to undermine the regional development agenda by betraying [the] noble objectives [of SADC] with impunity" that individual access to the Tribunal exists.[179] Indeed, the Tribunal "was created to entertain, among other issues, human-rights related complaints ***particularly*** *by citizens against their states*", the Constitutional Court held.[180] Thus the Tribunal's human rights jurisdiction at the instance of individuals is an integral part of its *raison d'être*.

67. The Tribunal, in turn, forms an integral part of the SADC objectives and their realisation. It is an essential SADC organ. It is also the only overseer of certain founding principles of the SADC Treaty: the rule of law and human rights. The bearers of human rights are human beings. Hence individual access (i.e. access by individual human beings) to the Tribunal is inherent in and imperative to the SADC regime.

68. Finally, the spurious suggestion that the Tembani applicants have "failed to set out the necessary allegations in order to demonstrate a case that the President's signature of the Protocol was irrational or in bad faith"[181] is not supported by the papers. The papers show that the termination of the Tribunal's jurisdiction in respect of individual is the culmination

[178] *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at para 1.
[179] *Id* at para 2.
[180] *Ibid*, emphasis added.
[181] Record vol 9 p 861 para 28.

of Zimbabwe's retaliation against the Tribunal.[182] It was accomplished during Zimbabwe's chairmanship of the SADC Summit.[183] All of this is common cause.[184] It is indeed irrational, arbitrary and *mala fide* to respond to the Tribunal's referral of Zimbabwe's repeated contemptuous disregards for the Tribunal's orders by taking no steps against Zimbabwe, but instead acceding to Zimbabwe's initiative to dismantle the Tribunal. President Zuma had every opportunity to veto this. Instead he actively signified his respect for the process and the SADC member which showed no respect for SADC principles, human rights or the SADC Tribunal's orders. Thus, that "the Protocol was adopted by SADC, an international organisation of which South Africa is a member"[185] does not demonstrate *bona fides* or rationality. It confirms *mala fides* and irrationality. SADC adopted the Protocol, because President Zuma gave his consent. Without it, SADC could not adopt the Protocol. That "the Protocol is in line with the prior determination by the SADC Summit"[186] only servers, in turn, to confirm premeditation. And that the signature is now contended to be "simply a formal, preliminary step that did not bind South Africa" is inconsistent with section 231(3) of the Constitution and the recognition by the House of Lords, confirmed by the SADC Tribunal: even inchoate action impeding access to judicial scrutiny of executive conduct is suspect and to be treated as such by courts. Nothing in the answering papers dispels what is much more than a mere suspicion established by the

[182] Record vol 10 pp 988-990 paras 38-41, Record vol 10 p 997 para 60; Record vol 10 p 1004 para 80; Record vol 10 p 1007 para 88.
[183] Record vol 3 p 249 para 3; Record vol 10 p 1007 para 88.
[184] Record vol 10 p 997 para 60; Record vol 10 p 1008 paras 91-92; Record vol 10 p 1011 para 99.
[185] Record vol 9 p 862 para 28.1.
[186] Record vol 9 p 862 para 28.2.

Tembani applicants' papers. In these circumstances the culture of justification requires that the respondents justify the President's signature.[187] They have signally failed to do so.

(4) *Mala fides*

69. The Tembani applicants' founding papers establish the absence of any rational basis for the "consensus" decision-making culminating in the President's impugned signature. Absent any legitimate rationale, the repudiation of the expert report and the Ministers of Justice and Attorneys-General's advice strongly suggest *mala fides*, as the founding papers expressly pleads.[188] This was not even properly traversed let alone adequately addressed – notwithstanding the purported reservation of a "right to deal more fully with any allegations of bad faith" in the respondents' answering affidavit filed in the intervention application.[189]

70. In the subsequent attempt at an answering affidavit, the new deponent had to resort to the "context"[190] and generalities regarding (unidentified and undisclosed)[191] "policies of the Presidency".[192] The Tembani applicants' replying affidavit demonstrates the

[187] *S v Makwanyane* 1995 (3) SA 391 (CC) at para 156; *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) at paras 167-169 (and authorities there cited); *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at para 363; *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at para 193 fn 220, citing *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) at para 159; *President of the Republic of South Africa v M & G Media Ltd* 2011 (2) SA 1 (SCA) at paras 9-11, 18, 20; *Avusa Publishing Eastern Cape (Pty) Ltd v Qoboshiyane NO* 2012 (1) SA 158 (E) at para 21.
[188] Record vol 3 p 271 paras 25-26.
[189] As mentioned, the answering affidavit filed in the intervention application does not form part of the record. This is by the respondents' election: Record vol 9 p 850 para 9.
[190] Record vol 7 p 653 para 78.
[191] Record vol 15 p 260 para 19.
[192] Record vol 9 p 945 para 6.

fallaciousness of this attempt.[193] And the Supreme Court of Appeal's judgment in *President of the Republic of South Africa v M & G Media Ltd* confirms that the same approach – adopted in unrelated previous litigation in which the Presidency unsuccessfully attempt to defend its submissive attitude towards Zimbabwe – is untenable.[194]

71. The "axing" of the Tribunal has correctly been described as "duplicitous" action on the part of "SADC leaders",[195] and "collusion amongst the SADC Heads of Government to ignore the rule of law."[196] It has been decried by *inter alios* Emeritus Archbishop Desmond Tutu,[197] and accurately labelled "malevolent".[198]

72. *Mala fides* have thus been sufficiently established, insufficiently refuted, and constitutes a separate and self-standing review ground of the President's "election" to sign the 2014 Protocol.[199]

(5) <u>The Prematurity Point</u>

73. The prematurity point is understandably not taken *in limine*. This is because it is rendered a posterior point by Government's own answering affidavit. This approach simultaneously renders the prematurity point redundant. But it was bad from the start.

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[193] Record vol 15 pp 1257-1258 paras 11-13; Record vol 9 p 1261 para 21; Record vol 15 pp 1261-1262 para 23; Record vol 15 pp 1266-1273 paras 38-55; Record vol 15 pp 1277-1280 paras 68-73.
[194] 2011 (2) SA 1 (SCA) at paras 18-20, 31 and 33, rejecting the "perfunctory … responses" advanced on behalf of the Presidency and finding that no evidential basis existed for the bald assertions advanced on behalf of the Presidency.
[195] Fritz "SADC Leaders Duplicitous in Axing Tribunal" *Mail & Guardian* (7 September 2012).
[196] Cowell (2013) "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction" 13(1) *Human Rights Law Review* 153 at 154.
[197] *Ibid*; Christie "Killed off by 'kings and potentates'" *Mail & Guardian* (19 August 2011).
[198] Wasiński (2013) "The Campbell Case: A New Chapter of the Saga" 2013(4) *Slovak Yearbook of International Law* 1.
[199] *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at paras 80.

74. This we shall show below with reference to the point as it was initially taken, the self-destructive stance subsequently taken, and the mistaken merits of whatever had been or now remains of the point. It was, at best for the respondents, merely dilatory. That stance, by the constitutional role model,[200] is deplorable.

(a) *The point pleaded*

75. The prematurity point was first taken in the respondents' main answering affidavit filed in response to the LSSA's founding affidavit.[201] The answering affidavit filed in response to the Tembani applicants "refer this Court to what has been said in that affidavit".[202] The point as taken in "that affidavit" rested on the factual version that "[t]he 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".[203] The factual problem with this statement is that it has been overtaken by the facts to which the President's next deponent subsequently deposed as regards the status of the President's and the national executive's consideration whether to seek parliamentary approval. This is

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[200] *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) para 68 (references omitted):

> "South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example. This principle cannot be put better than in the celebrated words of Justice Brandeis in *Olmstead et al v United States*:
>
> > 'In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. ... Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. ... If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.'
>
> The warning was given in a distant era but remains as cogent as ever. Indeed, for us in this country, it has a particular relevance: we saw in the past what happens when the State bends the law to its own ends ... . The legitimacy of the constitutional order is undermined rather than reinforced when the State acts unlawfully."

[201] Record vol 7 pp 636-642 paras 30-45.

[202] Record vol 9 p 853 para 19.

[203] Record vol 7 p 639 para 39.

addressed below. The legal problem with this statement is manifold. These, too, are addressed below.

76. What requires to be addressed at this stage is the "conclusion" on this "point" in the respondents' initial answering affidavit,[204] which is the original source of the prematurity point (to which the respondents' subsequent answering affidavit in response to the Tembani applicants cross-refer). It, too, is self-destructive.

77. The respondents' main answering affidavit raises (what are suggested to be)[205] four "issues" that "should inform this Court's decision *whether* to entertain the [LSSA's] premature challenge."[206] Thus the respondents correctly accept that even had they properly established prematurity, then this Court would nonetheless have to exercise a discretion whether or not to uphold the point.

78. The discretion is "informed", the respondents contend, firstly, by the fact that section 231 of the Constitution requires executive action first and legislative action later. This is wrong. Section 231(1) confers an exclusive power on the national executive. Ratification is an executive act, not a legislative competence. No legislative action is required by Parliament under the Protocol. As mentioned, the Protocol is of a technical, administrative or executive nature. It therefore does not require parliamentary approval.[207]

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[204] Record p 641 para 44.
[205] They are, in fact, three. The third and fourth points are one and the same. The third contends that exceptional circumstances operate as criterion (Record vol 7 p 641 para 44.3), and the fourth contends that this criterion has not been satisfied by the LSSA (Record vol 7 p 642 para 44.4).
[206] Record vol 7 p 641 para 44, emphasis added.
[207] Section 231(3) of the Constitution, whose text has been quoted above.

79. The second issue which "should inform" this Court's discretion, so the respondents contend, is that the Court entertaining the merits might "run the real risk of prejudging and pre-empting the constitutional competence entrusted to Parliament to consider whether to approve this international agreement".[208] For the reasons stated above, this is an incorrect legal supposition. Because of the nature of the Protocol, the Constitution "entrusts" the "competence" to the executive. No constitutional responsibility on the part of Parliament exists. Furthermore, as a matter of *fact* the entirely tentative resort to "risk" of pre-emption or prejudging has now – on the respondents' own papers – been confirmed to have been misplaced speculation (if not, in fact, calculated obstructiveness).

80. The third issue is the suggestion that "exceptional circumstances" had to be established before pre-empting "any consideration by Parliament".[209] This, too, has been overtaken by the actual factual situation subsequently disclosed. It is that the executive did not actually intend to present the Protocol to Parliament for its approval. This is why it had not happened in the many months since signature.[210] Although the respondents' answering affidavits attempt – contrary to the Constitution's text[211] – to retrofit a defence on the basis that parliamentary approval was required (because the Protocol is *not* a section 231(3) treaty), the truth is that "no decision has been taken to do so" (i.e. "to … place [the Protocol]

[208] Record vol 7 p 641 para 44.2.
[209] Record vol 7 p 641 para 44.3.
[210] Record vol 9 p 1005 para 84.
[211] See e.g. Record vol 9 p 854 para 20.5, which argues that whereas section 231(3) provides that international agreements of technical, administrative or executive nature, or agreements which do not require either ratification or accession, entered into by the national executive, bind South Africa without approval, "agreements requiring ratification or access, as is the case with the 2014 Protocol, will need to be approved by both Houses of Parliament in order to become binding on South Africa." This is wrong, because section 231(3) of the Constitution expressly provides that international agreements of technical, administrative or executive nature do *not* require parliamentary approval. That they might require ratification or accession is a different issue. Ratification or accession is an executive act. It is not to be confused with approval by Parliament, as the respondents' argument does.

before Parliament for approval").[212] The respondents have now confirmed that they have no intention of obtaining any parliamentary approval before this Court's determination of the matter.[213]

81. This revelation apart, contrary to the so-called fourth point invoked against the LSSA,[214] the Tembani applicants have certainly demonstrated that "exceptional circumstances" do exist. The Tembani applicants' papers demonstrate *inter alia mala fides*. This justifies judicial intervention.[215] As the respondents point out, nine of the required ten signatures have already been provided. It is therefore critical that that the legality of signing the Protocol be established and President Zuma's signature be removed.

82. Therefore each of the "four" issues which the respondents invoke actually supports the exercise of this Court's discretion in favour of entertaining the application, even were it indeed to have been "premature". The attempt to invoke "important constitutional and separation of powers issues" based on these "four" contentions are therefore and own goal. It is also legally misconceived. As the Constitutional Court held, the correct application of this principle is as follows

> "Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution. It is therefore not for this court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it. Courts ought not to blink at the thought of

[212] Record vol 9 p 852 para 17.1.
[213] Record vol 9 p 856 para 20.8.
[214] Record vol 7 p 642 para 44.4.
[215] As Constitutional Court cases like *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at para 168 confirm, bad faith is a basis for entertaining a case despite undue delay. The same logic equally applies to the converse situation: prematurity, as Constitutional Court cases on standing confirms.

> asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved."[216]

83. As the respondents concede, there is no extant parliamentary process. Nor does this application seek to prescribe anything at all to Parliament. Parliament is not cited and no relief is sought against Parliament. This is therefore a case where the doctrine of separation of powers requires this Court to fulfil the authority entrusted exclusively to the judiciary: determining issues of legality.

(b) *The point imploded*

84. The respondents' answering affidavit filed in response to the Tembani applicants explains why the prematurity point was not taken *in limine*. It is because the respondents themselves belatedly disclosed a dispositive fact. It entirely destroys the prematurity point. The fact is that "[t]he President, in consultation with the Cabinet and the other Government respondents, is awaiting the outcome of this case before taking a final decision whether or not to table the 2014 Protocol before Parliament".[217]

85. Therefore the respondents themselves require this Court's determination of this application before they are in a position to act on the President's signature or regard it a dead letter.[218] Thus the matter is *not* unripe. It is awaited, they admit, by the respondents themselves. The issue is accordingly not academic or premature, but live, pressing and contested.

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[216] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para 93.
[217] Record vol 9 p 856 para 20.8.
[218] Record vol 15 p 1266 para 37.

(c) *The point is obstructionist*

86. What the belated revelation identified above further confirms is that the respondents' reliance on ripeness in this case was not justifiable from the outset. Indeed, it was – always – simply cynical. The point only existed because the President never sought the parliamentary approval which it is now contended on his behalf was required.[219]

87. This is inconsistent with binding precedent. In *Democratic Alliance v Minister of International Relations and Cooperation* the respondents pleaded prematurity on the basis of an imminent parliamentary process.[220] A Full Bench of this Court rejected the argument. It held that the Court was not concerned with what Parliament "might or might not do in future".[221] The Court was concerned with the question whether another arm of Government, the Executive, had "already acted unconstitutionally".[222] On this basis alone the Court was not only entitled, but constitutionally enjoined to enquire into the conduct of the Executive.[223] Seeking to "oust" the Court's jurisdiction by invoking prematurity was "not permissible", the Full Bench held.[224] The same applies *a fortiori* in this case. This is because there is no imminent parliamentary process. Instead, the outcome of this case is awaited by Government itself before the initiation of any parliamentary process by the respondents will even be considered.

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[219] Record vol 10 pp 1005-1006 para 84.
[220] 2017 (3) SA 212 (GP).
[221] *Id* at para 15.
[222] *Ibid*.
[223] *Ibid*.
[224] *Id* at para 16.

88. The point is bad also in the light of the most recent Constitutional Court judgment dealing with ripeness. In *Jordaan v City of Tshwane Metropolitan Municipality* the government respondents strenuously contended that the constitutional question should not be countenanced by the court, because it was not reached.[225] Writing for a unanimous Court, Cameron J held that that "[t]he constitutional dispute was large and pressing".[226] The Constitutional Court therefore held that "[t]he High Court's decision to decide it despite the factual and other considerations the municipalities sought to strew in its path was clearly right."[227] Contentions on ripeness (or prematurity) notwithstanding, the matter was ready for determination.

89. The Constitutional Court's earlier caselaw likewise confirms that where constitutional rights are threatened, it is not necessary to await the implementation of the measure before approaching a court.[228] The Constitutional Court also explained the correct function and purpose of the doctrine of ripeness.[229] It

> "serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. … The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered."[230]

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[225] [2017] ZACC 31 (29 August 2017) at para 6.
[226] *Id* at para 9.
[227] *Ibid*.
[228] *Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) at para 14.
[229] *Ferreira v Levin NO* 1996 (1) SA 984 (CC).
[230] *Id* at para 199.

90. This case is not concerned with prospective, hypothetical or abstract events. It is concerned with the President's signing of the 2014 Protocol. This has happened, and the President himself now contends that the outcome of this case is awaited to inform his decision whether or not to seek parliamentary approval. There is accordingly no prematurity or unripeness. Serious illegality – which no parliamentary process can ever purge,[231] even *were* any ever to be pursued[232] – vitiates the President's signature.[233] Therefore overwhelming national and international public interest and the compelling interests of justice warrant exercising this Court's discretion in favour of hearing the matter, even were there to have been any degree of prematurity.

91. On any approach, thus, the ground of opposition based on "prematurity" is unmeritorious.

D. <u>Residual points</u>

92. Two residual points – not pleaded, however, as grounds of opposition – are raised obliquely in the respondents' answering papers. The first is that the President is not accountable for his signature, because the SADC Summit bears collective responsibility for the "consensus" decision in which the President participated. The second relates to the formulation of the remedy. Neither point is properly taken, as we shall show in dealing with each in turn.

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[231] *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP) at para 59.
[232] Record vol 15 p 1264 para 31.
[233] Record vol 15 p 1262 para 25.

(1) Collective (non-)accountability?

93. It is not open to the President to disavow individual accountability or to invoke consensus decision-making. This is not only because the President's consent precedes consensus and depends on him not exercising veto powers. It is also because the Constitutional Court has made the President's individual responsibility for the exercise of powers vested in the national executive quite clear. Writing for a unanimous Court in *Economic Freedom Fighters v Speaker, National Assembly*,[234] the Chief Justice held

> "The President is the head of state and head of the national executive. His is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the wellbeing of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight. To him is the executive authority of the entire Republic primarily entrusted. He initiates and gives the final stamp of approval to all national legislation. And almost all the key role players in the realisation of our constitutional vision and the aspirations of all our people are appointed and may ultimately be removed by him. Unsurprisingly, the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination that all other progress-driven nations strive towards on a daily basis. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of state affairs and the personification of this nation's constitutional project."[235]

[234] 2016 (3) SA 580 (CC).
[235] *Id* at para 20, footnotes omitted.

94. Thus the President cannot contend that he is only collectively accountability, or that his responsibility is to respect his peers. His responsibility is to respect the Constitution and the rule of law in the exercise of every public power. In exercising powers vested specifically in the national executive by section 231(1) of the Constitution (as the respondents concede),[236] the President attracts judicial scrutiny of his own "election" to sign a treaty. This is because, as Ngcobo CJ held in *Glenister v President of the Republic of South Africa*,[237] the separate, executive conduct of signing an international agreement under section 231(1) of the Constitution creates its own, "different legal consequences."[238]

95. This is confirmed by international law.[239] As we have shown, the African Commission itself held in the Tembani communication that Member States of international organisations (like SADC) can indeed be held directly responsible for wrongful acts or omissions.[240] And as Wasiński explains in writing on that communication, that fact that the decisions on "the SADC Tribunal were formally made not by the SADC Member State or States but by the SADC Summit" and that "SADC Member States had 'merely' reached

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[236] Record vol 9 p 857 para 23; Record vol 9 p 857 para 25.
[237] 2011 (3) SA 347 (CC).
[238] *Id* at para 89, applied by a Full Bench of this Court in *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP) at para 34.
[239] See e.g. Lock "Beyond Bosphorus: The European Court of Human Rights' Caselaw on the Responsibility of Member States of International Organisations under the European Convention on Human Rights" (2010) *Human Rights Law Review* at 9, explaining the ECHR's judgments in *Matthews* and *Bosphorus*. These cases establish that "contracting states cannot escape their responsibility under the Convention by transferring sovereign rights on international organisations. They remain responsible for violations of Convention rights originating in the organisation's founding treaties (*Matthews*) and violations of the Convention rights originating in acts or omissions by the organisation's organs (*Bosphorus*)." The "absence of a domestic act … cannot justify a differentiation in human rights protection guaranteed by the Convention", otherwise there is a "clear violation of Convention rights" and "a complete denial of judicial review" (*id* at 10).
[240] Record vol 10 p 926 para 132.

consensus" does not mean that the action cannot be attributed to an individual State Party.[241] To the contrary, the correct legal position is that

> "[Article 1 of the African Charter] charges the State Parties with the fundamental duty to 'recognise the rights and undertake to adopt legislative or other measures to give effect to them'. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Charter."[242]

96. SADC's legal personality therefore does not detract from Member State's individual legal liability.[243] Participation by a member State "in reaching relevant consensual decisions of the SADC Summit (and thus not performing its treaty-based competence to protest) may amount to breaches" of the rule of law.[244] As the African Commission itself confirmed, if a State merely "neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation."[245]

97. Conversely, as the African Court on Human and Peoples' Rights has held, "international obligations arising from a treaty cannot be imposed on an international organisation, unless it is a party to such treaty or it is subject to such obligations by any other means recognised under international law."[246] Therefore, because "the African Union is not a party to the

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[241] Wasiński (2013) "The Campbell Case: A New Chapter of the Saga" 2013(4) *Slovak Yearbook of International Law* 14.
[242] *Ibid*.
[243] *Id* at 15-16.
[244] *Id* at 20.
[245] *Commission nationale des droits de l'Homme et des libertés v Chad* (October 1995) 74/92 at para 20; *Curtis Francis Doebbler v Sudan* (November 2009) 235/00 at para 110, cited in Wasiński *op cit* at 20 fn 67.
[246] *Femi Falana v African Union* Application no. 001/2011 at para 69.

Protocol [to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights] … it cannot be subject to legal obligations arising from that treaty."[247] Thus "the mere fact that the African Union has a separate legal personality does not imply that it can be considered a representative of its Member States with regard to obligations that they undertake under the Protocol."[248] Therefore "the African Union cannot be sued before the Court on behalf of its Member States."[249]

98. It follows that SADC and the SADC Summit, too, cannot be sued before the African Court. Nor before the African Commission, as the litigation history of the Tembani applicants already established. Thus legal liability cannot be attributed to the SADC Summit. It follows that the President's argument that he is not liable, and that liability should be attributed to the Summit, is mistaken. It is also transparently cynical. It is an obvious tactical attempt to avoid consequences.

(2) <u>Remedy</u>

99. The same applies to the President's attempt to invoke the doctrine of separation of powers to stave off effective relief. The correct legal position is well-established: a declaratory order of invalidity is mandatory,[250] and appropriate and effective consequential relief is constitutionally required.[251]

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[247] *Id* at para 60.
[248] *Id* at para 71.
[249] *Id* at para 72.
[250] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para 103.
[251] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69.

100. The respondents do not raise any sustainable objection against the relief. Instead, they rely on internally-inconsistent arguments. They contend that the relief is "impermissibly open-ended and vague",[252] yet they also argue that "it is submitted that it would not be appropriate to dictate to the President how he should act, in the event of a finding of constitutional invalidity."[253] The correct position is that the consequential relief foreshadowed in the Tembani applicants' intervention application does not dictate to the President how he should remedy his signature.

101. In any event, on the respondents' pleaded case, the signature is merely a formal act. On that basis it is quite capable of being retracted by formal communication to the SADC Secretariat. That the manner and form of the retraction is not stipulated does not result in "impermissibl[e] open-ended[ness] or vague[ness]".[254]

102. Instead, the relative open-endedness and flexibility is consistent with the Constitutional Court's judgment in *Economic Freedom Fighters v Speaker, National Assembly*.[255] That

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[252] Record vol 9 p 876 para 53.2.

[253] Record vol 9 p 876 para 53.3.

[254] To the contrary, the formulation is consistent with *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 191 (reiterated in *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at para 28), holding that courts "will not be prescriptive as to what measures the State takes [in concluding international agreements], as long as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt."

[255] 2016 (3) SA 580 (CC) at para 93:

> "It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give it, for the purpose of holding the executive accountable and fulfilling its oversight role of the executive or organs of state in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum total of the constitutionally permissible judicial enquiry to be embarked upon. And these are some of the 'vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government'. Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution. It is therefore not for this court to prescribe to

the relief is appropriately formulated is therefore, in fact, *confirmed* by the President himself.[256]

103. Applying some of the above Constitutional Court judgments, in *Democratic Alliance v Minister of International Relations and Cooperation* a Full Bench of this Court held that the withdrawal of an impugned notice constituted just and equitable relief.[257] The equivalent relief in the circumstances of this case is an order directing the withdrawal of the President's signature.

104. It is this relief that is sought. Its appropriateness is therefore with respect beyond debate.

D. <u>Conclusion</u>

105. For the reasons set out above we submit that a proper case is established for the relief sought. It is that the President's signature of the 2014 Protocol on the SADC Tribunal be declared unlawful and set aside, and that the President be directed to retract his gesture "that South Africa was open to considering the ratification of [th]a[t] Protocol". In other words, the President must withdraw his signature.

Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it."

[256] See e.g. Record vol 9 p 981 para 20; Record vol 9 pp 985-986 paras 31-33; Record vol 9 p 1000 para 68; Record vol 9 p 1000 para 70.

[257] 2017 (3) SA 212 (GP) at para 81.

106. As regards costs, the President's conduct in this litigation has been shown to have been oppressive and unreasonable.[258] Through this conduct litigants with limited means have been forced to incur unwarranted legal costs. It is not just and equitable that they should bear this. Therefore costs should be awarded to them both in respect of the main application and the belatedly-conceded intervention application. In respect of the latter, the attorney and client scale is appropriate.

107. Finally, as regards the late filing of these heads of argument, this is addressed in the accompanying condonation application. In short, the delay is attributable to a failure by the first applicant's attorneys to bring the revised directive regarding the filing of heads of argument to the second to seventh applicants' attorneys' attention; the indisposition of both counsel acting for the second to seventh applicants; and the defects and omissions in the record, the last of which remedied by the respondents only on the court day preceding the filing of these heads. Because the hearing date is scheduled for February 2018 (five months hence), no prejudice arises. We nonetheless express our regret if any inconvenience was caused.

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3 September 2017

[258] *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) at para 27; *In re Alluvial Creek Ltd* 1929 CPD 532 at 535.