

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 20382/2015

In the matter 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
FRANC FARM (PVT) LTD	Seventh Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
MINISTER OF INTERNATIONAL RELATION AND CORPORATION	Third Respondent

FIRST APPLICANT'S REPLYING AFFIDAVIT



I, the undersigned

JOHANNES CORNELIS JANSE VAN RENSBURG

do hereby make oath and state:

1. I am an adult male and practising attorney. I am also a co-chairperson of the Law Society of South Africa.
2. The facts contained herein fall within my personal knowledge unless the context indicates otherwise and are to the best of my knowledge and belief both true and correct.
3. Legal submissions in this affidavit are made on the strength of legal advice obtained from the Applicant's legal team, the advice which I accept as correct.
4. I have read the answering affidavit deposed to by **TERESA NONKULULEKO SINDANE** and wish to reply thereto.

Introduction

5. The Applicant's challenge to the First Respondent's conduct, as indicated in the founding affidavit, is premised on his participation in suspending the SADC Tribunal and his subsequent signing of the 2014



Protocol on the SADC Tribunal, in contravention of the Constitution i.e. the right of access to justice.

6. In paragraph 17 of the founding affidavit, the First Applicant stated that *"By signing the 2014 Protocol, the President infringed South African citizens' right of access to justice. This right is a right contained in the Bill of Rights."*
7. The First Applicant based the above argument on *inter alia* Section 34 of the Constitution which provides that: *"Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent or impartial tribunal or forum"*.
8. The Respondents' defence can be summarised as follows.
 - 8.1. It is the Respondent's contention that the ambit of the right afforded by Section 34 of the Constitution is limited to access to Courts and tribunals or other forums within South Africa and it does not entail a right of access to international courts or tribunals which have been created by international organisations, such as the SADC tribunal. Further that the obligation of the President and/or other State officials in terms of Section 34 of the Constitution does not extend beyond the borders of South Africa.



- 8.2. That the Protocol 2014 has not been ratified by the parliament and therefore, the challenge to it is premature and the relevant official, to wit, High Commissioner of South Africa to Namibia, should have been cited as a party to the proceedings.
 - 8.3. That the decision to suspend operation of SADC tribunal was not made by way of voting but consensus.
 - 8.4. That a decision to participation in the amendment of the protocol falls within the ambit of the Executive.
 - 8.5. That the application is out of time.
9. In order to properly reply to the above issues raised in the Respondents' answering affidavit, I would structure my affidavit in the following manner:
- 9.1. The alleged premature launching of the application
 - 9.2. Right of access to justice.
 - 9.3. Powers of the President to make executive decision.
 - 9.4. Non Joinder.
 - 9.5. Reasonable time.

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The alleged premature launching of the application

10. The nub of the First Applicant's challenge to the First Respondent's conduct is not contingent upon parliament ratifying the impugned amendment of the protocol but a call for the President to account to the Constitution. Whether the President, in exercising his constitutional powers, complied with the Constitution is what is at issue, not whether such amendment of protocol will be ratified by parliament or not.

11. In the founding paper, the First Applicant prayed for an order declaring the Respondents' role in the suspending of the SADC tribunal unconstitutional without dealing with the question of whether the amendment of the protocol was ratified or not as the First Applicant did not succeed in obtaining information from the respondents on whether it was ratified or not. Having said that, it is not necessary for the purpose of determination of the constitutionality of the conduct impugned.

12. The fact that the President or parliament has not ratified the amendment of the protocol, does not assist the Respondents' case because, at SADC level such amendment has a final effect as it is not supposed to be domesticated through parliament. Put differently, the amendment is self-executing at the level of SADC for the reasons mentioned above. I further wish to impress that "*participation in the*



suspending of the SADC tribunal” as indicated in the notice of motion, does mean that the protocol must be ratified in order for the challenge to stand.

13. The Respondents’ failure to object to the signing of the protocol 2014 and/ or the Respondent’s signing of the protocol 2014 is not in line with the Constitution of the Republic i.e. section 34 of the Constitution. It is apposite to state that there are cases which are pending before the tribunal and some of which have been finalised and successful parties cannot execute their orders due to the new protocol, so, failure by the First Respondent to object or by signing the protocol, is not in line with the Constitution of the Republic, which promotes right of access to justice.

Right of access to justice

14. It is common cause that Protocol 2000 constitute an international agreement which is governed by Section 231 of the Constitution which provides that:

“An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).”



15. It further state that when the State enters into an international agreement, it is bound to *"respect, protect, promote and fulfil"* the rights contained in the Bill of Rights and any action which is in conflict with the principle, it is unconstitutional and therefore unlawful.

16. In view of the fact that Protocol 2000 was adopted in line with our Constitution, more particularly Section 231 of the Constitution which envisages the need to *"respect, protect, promote and fulfil the rights contained in the Bill of Rights"* whenever the state enters into international agreement, any amendment of it must be in line with the Constitution of the Republic. Protocol 2000 provides *inter alia* for the right of the citizens of the Republic to approach SADC tribunal for adjudication of their dispute. Therefore, it is the Applicant's case that amendment of the protocol limits the powers of the tribunal to interstate dispute, which flies in the face of the existing right of the people of the Republic which is protected by section 34 of the Constitution. Of paramount importance, such amendment is in contravention with Protocol 2000 which was adopted in line with the prescript of the Constitution of the Republic, more particularly the citizen's right of access to the tribunal.

17. The Respondents' contention that the citizens' entitlement to access the tribunal is only limited to tribunals and courts within the Republic is illogical in the sense that Section 231 of the Constitution makes provision that, once the State signs an international agreement, the State is bound by it for as long as the agreement is in compliance with

the Constitution of the Republic. It is common cause that Protocol 2000 was in compliance with the Constitution of the Republic it is on this basis that I submit that the only instance where the citizens of the Republic will not be entitled to the right of access the tribunal, is when it is in contravention of the Constitution, which is not the case in this instance.

18. Protocol 2000 has become law in the Republic by virtue of being ratified by the parliament and therefore the right of access to justice, as provided for in section 34 of the Constitution, includes the right of access to the tribunal by the citizens of the Republic. The Respondents' argument that section 34 applies to tribunals and courts within the Republic is devoid of any legal foundation in view of the jurisdictional facts of section 34 which are as follows: Firstly, a right of access to a court or other tribunal or forum is created for a person involved in a dispute that can be resolved by law. Secondly, it requires tribunals or forums other than the courts to be independent and impartial when they are involved in the resolution of legal disputes. Thirdly, it is due process to require the legal dispute to which it applies to be decided in a fair and public enquiry. To access the right, there must be a dispute capable of resolution by law and once this is present, the competence of Section 34 will apply.

19. In their answering affidavit the Respondents indicated:



“That the Applicant fails to appreciate that the manner in which positions are taken at the summit often requires a level of compromise between the interest of member state. This is the case in all international organisations made up of many sovereign state which are required to reach consensus or at least majority decision on various issues.”

“Therefore, the determination of the jurisdiction and powers of international tribunal is by its very nature an exercise of written consensus between the states.”

20. The Respondents are totally missing the point as the First Applicant’s challenge is not premised on the manner in which the amendment of protocol was passed but the failure by the respondents to object and/or the Respondent’s signing the amendment of the protocol in contravention of the Constitution of the Republic. Therefore, it is not important whether the decision was made by way of consensus or by way of voting.

Powers of the President to make executive decision

21. The Respondents raised a defence that the decision with regard to the amendment of the protocol falls within the powers of the President, to wit, executive powers. By implication the Respondents argue that since the President has powers to make executive decisions, he was correct in taking the impugned decision.



22. Be that as it may, the executive powers exercised by the President are not beyond scrutiny by our law. It has to be tested against the principle of legality, to wit, whether the President in exercising executive powers complied with the Constitution of the Republic or relevant legislation. In this instance it is the case of the First Applicant that the President's failure to object or by signing the treaty contravened Section 34 of the Constitution.

Non Joinder

23. I was advised that the test for joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. Save to state that the meeting was attended by the High Commissioner, the Respondents failed to demonstrate that the order cannot be sustained without necessarily prejudicing the interest of the party alleged and the party's legal interest in the matter.
24. The High Commissioner attended the function on behalf of the Respondents and it is on this basis that the Respondents claim that he should have been joined, which is incorrect in law. The Commissioner who attended the meeting on behalf of the Respondents was acting on delegated powers. In any event, the alleged Commissioner is an employee of the Third Respondent which is a party to the litigation and whatever interest he has, will be traversed by the Third Respondent on his behalf.



Reasonable Time

25. In their answering affidavit the Respondents also raised a defence that the application was brought out of time. I would like to indicate that in light of the fact that this matter involves a number of parties in different countries who are challenging the same conduct in their respective countries and the fact that First Applicant has tried to get information from Government with regard to the status of the amendment and the Government's position with regard it, it is unsustainable for the respondents to argue that the matter was brought out of reasonable time.
26. Be that as it may, I submit that the declaration does not have a time limit and therefore the time which it was brought, was reasonable in light of the predicaments that First Applicant encountered before launching these proceedings.
27. I now deal with the answering affidavit of the respondents

Ad Paragraphs 1 to 4

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

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Ad Paragraphs 5 to 9

29. I note the content of these paragraphs.

Ad Paragraphs 10 to 12

30. Save to state that the Applicant's challenge is directed at the President's participation in the suspension of the SADC tribunal as canvassed in the founding affidavit, I note the remainder of the allegation in these paragraphs.

Ad Paragraphs 13 and 14

31. I note the content of these paragraphs.

Ad Paragraph 15 to 17

32. I note the content of these paragraphs. I wish to indicate that the "*suspension*" provided for in the founding affidavit refers to the suspension of the tribunal and other actions which include, but are not limited to, the issue of putting moratorium on the appointment of judges, amending the jurisdiction of the tribunal and not renewing the contract of the judges whose contracts were expiring.

Ad Paragraph 18

33. I note the content of this paragraph.



Ad Paragraph 19

34. I note the content of this paragraph.

Ad Paragraph 20

35. I deny the content of paragraph 20 and put the respondent to the proof thereof.
36. The fact that the First Respondent did not attend the meeting does not in any way exonerate him from ensuring that his delegatee act in accordance with the Constitution of the Republic. The Commissioner who attended the meeting did so as a representative of the President and the government of the Republic. The decision to enter into international agreement falls within the powers of the President and the President may delegate any party or any member of his Government to execute such a responsibility on his behalf, but that does not mean that the responsibility to comply with the Constitution shifts from the President to the delegatee. It is still the responsibility of the President to make sure that the delegated powers are exercised within the confines of the Constitution.
37. In any event the Third Respondent (employer of the commissioner) is a party to the litigation.

Ad Paragraph 21

38. I note the content of this paragraph.

Ad Paragraph 22

39. I wish to indicate that the High Commissioner who attended the meeting did so, on behalf of the President and therefore does not have any or direct substantial interest in neither the current litigation nor any of his rights will be impaired or prejudiced if this matter is prosecuted without him being a party to the litigation. Of paramount importance the High Commissioner is an employee of the Third Respondent and the Third Respondent is cited as party to the litigation because the High Commissioner was furthering the department's business. Any interest that the High Commissioner has in this matter will be canvassed by the Third Respondent as his employer.

40. I deny the rest of the allegations herein and put the Respondents to the proof thereof.

Ad Paragraphs 24 to 29

41. I deny the content of this paragraph and put the Respondents to the proof thereof.



42. I wish to state that there is no statutory limit in the supreme court Act with regard to the time period within which the declaratory must be launched. Be that as it may, I wish to indicate that the application was launched within reasonable time as indicated in the preceding paragraph.

Ad Paragraphs 30 to 37

43. I deny the content of these paragraphs and put the Respondents to the proof thereof.

44. In amplification of my denial, I wish to indicate that the decision taken by the President or his representative at SADC level, to suspend the operation of the tribunal, is self-executing at that level. Put differently, the decision which was taken by SADC is binding on the tribunal at that level as it does not need to be ratified by any parliament.

45. Of paramount importance to this litigation is that the challenge to the President's conduct is not contingent upon the ratification of the proposed amendment but premised on whether the decision or failure to object by the President or his representative was in line with the Constitution of the Republic.

46. Therefore it is incorrect to rely on the fact that the proposed amendment has not been ratified by the government.

Ad Paragraphs 38 to 43

47. I deny the content of these paragraphs and put the Respondents to the proof thereof. I have already indicated in the preceding paragraphs that the Applicant's challenge to the First Respondent's conduct is not contingent upon the amendment being ratified by parliament but solely based on the conduct of the First Respondent whether it complies with the Constitution of the Republic, to wit, Section 34 of the Constitution. Therefore the defence that the challenge to the Respondents' conduct is premature lack substance because the current litigation is centred around the President's conduct or that of his representative on whether it was in line with the Constitution of the Republic.

48. I deny the remainder of the allegations in these paragraphs.

Ad Paragraphs 44 and 45

49. I deny the content of this paragraph and put the Respondents to the proof thereof. I wish to state that the Court is not invited to intervene or usurp the powers of the parliament to ratify the treaty but to make a determination on whether the President by signing or by failing to object to the amendment of the Protocol 2000 complied with the Constitution of the Republic. This issue is far removed from the enquiry of whether the treaty was ratified or is going to be ratified by parliament.



Ad Paragraph 46 to 50

50. I admit the content of these paragraphs.

Ad Paragraph 51

51. I note the content of this paragraph.

Ad Paragraph 52

52. I note the content of this paragraph.

Ad Paragraph 53

53. I note the content of this paragraph.

Ad Paragraphs 54 to 56

54. I deny the content of this paragraph in its entirety and put the Respondents to the proof thereof. As I have already indicated in the preceding paragraphs that Protocol 2000 is as defined in Section 231 as an international agreement which has been adopted and ratified by the South African Government, thus becoming South African law and the tribunal provided for in the protocol becomes accessible to the citizens of the Republic by virtue of the provision of the treaty and the Constitution of the Republic.



Ad Paragraphs 57 to 68

55. I note the content of these paragraphs.

Ad Paragraph 69

56. I deny the content of this paragraph and put the Respondents to the proof thereof. Protocol 2000 was ratified by the South African parliament and therefore was domesticated and the tribunal provided for in the Protocol 2000 falls within Section 234 of the Constitution by virtue of the ratification. The President had a constitutional responsibility to object to the proposed amendment of the protocol as it contravenes Section 234 of the Constitution. As I have indicated in the preceding paragraphs that the proposed amendment seek to deprive the right of the citizens to approach SADC tribunal whenever they have grievances against the State.

Ad Paragraphs 70 and 71

57. I deny the content of these paragraphs and put the Respondents to the proof thereof.

Ad Paragraph 72 to 75

58. I note the content of these paragraphs.



Ad paragraph 76

59. I deny the content of this paragraph. I refer this Honourable Court to the preceding paragraphs.

Ad Paragraph 77 to 81

60. Save to state that the challenge to the President's signature is not contingent upon whether the protocol after signature is binding on South Africa, but on the fact that whether the President in signing the protocol acted in line with the Constitution of the Republic.

61. I note the remainder of the allegations herein.

Ad Paragraph 82 to 85

62. I note the content of these paragraphs.

Ad Paragraph 86

63. I deny the content of this paragraph. I have already indicated the proper interpretation of Section 34 of the Constitution and the obligation that flows from it.

Ad Paragraph 87 to 89

64. I note the content of these paragraphs.

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Ad Paragraph 90

65. I deny the content of this paragraph. I refer the Honourable Court to the preceding paragraphs.

Ad Paragraph 91

66. I deny the content of this paragraph.

Ad Paragraph 92

67. I note the content of his paragraph.

Ad Paragraph 93

68. I have already indicated the basis for the challenge in the preceding paragraphs.

69. I deny the remainder of the allegations herein.

Ad Paragraph 94

70. I note the content of this paragraph.

Ad Paragraph 95

71. I note the content of this paragraph.



Ad Paragraph 96

72. I note the content of this paragraph.

Ad Paragraph 97 to 103

73. Save to state that I deny that the letter did not reach the attention of the Respondents and note the remainder of the allegations herein.

Ad Paragraph 104

74. I deny the content of this paragraph. The principle indicated in the case of **Kaunda v President of the Republic of South Africa** is not in line with the Respondents' case. **Kaunda** case deals with citizens of the Republic who seeks to enforce their constitutional right in a foreign country.

Ad Paragraph 105

75. I deny the contents herein and put the Respondents to the proof thereof.

76. I reiterate the facts I have traversed in the preceding paragraphs.

Ad Paragraph 106 to 110


77. I note the content of these paragraphs.



Ad Paragraph 111 to 113

78. I note the content of these paragraphs.

WHEREFORE the Applicant prays for an order in terms of the notice of motion.



DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Pretoria on this the 10th day of March 2017, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

TARRYN JADE NAICKER
COMMISSIONER OF OATHS
FSF LAW CHAMBERS
CNR BROOKLYN ROAD AND BROOKS ST
MENLO PARK, PRETORIA
PRACTISING ATTORNEY. R.S.A.



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