

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

CASE NO:

In the matter between:

THE LAW SOCIETY OF SOUTH AFRICA

Applicant

and

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

First Respondent

**THE MINISTER OF JUSTICE OF
THE REPUBLIC OF SOUTH AFRICA**

Second Respondent

**THE MINISTER OF INTERNATIONAL RELATIONS
AND CO-OPERATION OF THE REPUBLIC
OF SOUTH AFRICA**

Third Respondent

FOUNDING AFFIDAVIT

I the undersigned,

XOLANI MAXWELL BOQWANA

do hereby make oath and state that:

1. I am an adult male and practising attorney. I am also the 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. The information set out herein below in respect of SADC and its operations as well as the Southern African Development Community Lawyers Association ("SADCLA") are furnished to me by the Applicant who is member of the SADCLA and represented by Me Emilia Siwingwa whose confirmatory is attached hereto, marked as Annexure "FA14".
4. I am duly authorised to launch these proceedings on behalf of the Applicant.


THE PARTIES

5. The Applicant is **The Law Society of South Africa**. It is an association of the six constituent law societies of South Africa, namely the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces, the Black Lawyers Association and the National Association of Democratic Lawyers.
6. The Applicant has, *inter alia*, the following fundamental, enduring and long-term aims and objectives:

6.1 promote legal aid and the accessibility of all to the law and the courts;



- 6.2 uphold, safeguard and advance the rule of law, the administration of justice, the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution") and the laws of the Republic of South Africa;
- 6.3 initiate, consider, promote, support, oppose or endeavour to modify legislation, whether existing or proposed;
- 6.4 initiate, consider, promote, support, oppose or endeavour to modify proposed reforms or changes in law, practice, procedure and the administration of justice;
- 6.5 strive towards the achievement of a system of law that is fair, just, equitable, certain and free from unfair discrimination;
- 6.6 the LSSA is a member of the SADCLA and, as such, promotes the objectives of the principles contained in the SADC Treaty. I will deal with this aspect herein below.
7. The First Respondent is the **President of the Republic of South Africa**. The First Respondent is the Head of State and Head of the national executive. He is obliged by section 83 of the Constitution to uphold, defend and respect the Constitution as the supreme law of the Republic and to promote the unity of the nation and that which will advance the Republic. He carries out his duties at the Union Buildings of South Africa and is served in these proceedings care of the State Attorney's Office situated at 316 Thabo Sehume Street, Pretoria.



8. For the purposes of this application the First Respondent is the responsible member of the executive who negotiates and signs international agreements on behalf of the Government of the Republic South Africa.
9. The Second Respondent is the **Minister of Justice and Correctional Services** of the Republic of South Africa. The Minister is the political head of the Departments of Justice and Correctional Services, whose responsibility includes, amongst others, advising the First Respondent and the national executive about the international law obligations of the Republic of South Africa.
10. The Third Respondent is the **Minister of International Relations and Cooperation** of the Republic of South Africa. The Minister is the political head of the Department of International Relations and Cooperation and this department is responsible, amongst others, for the Republic's foreign policy.

PURPOSE OF THIS APPLICATION

11. The purpose of this application is to seek the relief as set out more fully in the Notice of Motion to which this affidavit is annexed to. It entails a declaratory order that:
 - 11.1 the whole process of suspending the Tribunal;
 - 11.2 failure to appoint judges; and
 - 11.3 all steps related thereto including the voting for and signing of and any attempt to ratify the 2014 Protocol



to be unconstitutional.

12. The aforesaid process is unconstitutional as the objective is to infringe or deprive the vested rights of citizens to have access to the Tribunal as set out in the SADC Treaty, to which the Government of the Republic of South Africa is a party to and bound in law. The aforesaid process and conduct is in contrast with the objectives of the Constitution of the Republic of South Africa, not in the interest of justice or the citizens of the Republic of South Africa.
13. As will be demonstrated hereunder the First Respondent has acted in a manner which infringes the citizen's right of access to justice.

LOCUS STANDI

14. During the course of August 2014, the Summit of SADC signed the 2014 Protocol. I attach hereto, a communiqué of the 34th SADC Summit which confirms that the 2014 Protocol has been adopted, marked annexure "FA1".
15. Unlike the previous Protocol ("the 2000 Protocol"), the 2014 Protocol deprives the right of citizens to refer a dispute between particular citizens and its government to the SADC Tribunal whereas this was not the case under the 2000 Protocol.
16. I attach copies of the 2000 and 2014 Protocols as annexures "FA2" and "FA3" respectively.



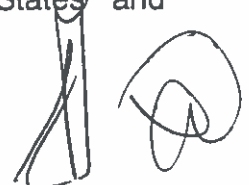
17. By signing the 2014 Protocol, the President infringed South African citizens' rights of access to justice. This right is a right contained in the Bill of Rights. I will return to this aspect later.
18. The President, at the Summit, signed and/or voted in favour of the 2014 Protocol. The 2014 Protocol must now be ratified in terms of the provisions of section 231 of the Constitution.
19. The other members of the SADC Lawyers Association have resolved to bring similar applications in their respective countries, to avoid the adopting and/or ratification of the proposed amended 2014 Protocol, by their Heads of State.
20. The Applicant launches this application acting in its own interest as well as in the interest of the public including the privates sector, civil society, non-governmental organizations, workers and employers organizations and citizens in terms of Section 38 of the Constitution of the Republic of South Africa.

The Establishment of the Southern African Development Community (SADC), the Summit, the Council and the Tribunal:

21. The Southern African Development Community (SADC) is an African intergovernmental organisation, constituting one of the regional pillars of the African Economic Community (AEC) and formally recognised as a Regional Economic Community (REC) of the African Union.

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22. The SADC was established on 17 August 1992 via the Treaty establishing the Southern African Development Community ("SADC Treaty") and has fifteen (15) Member States, including South Africa, which are bound by the Treaty.
23. The Summit, comprising the Heads of State and Government from each Member State, has been established by Article 9(1)(a) to be the supreme policy making institution of the SADC pursuant to Article 10 of the SADC Treaty.
24. The SADC Council of Ministers, comprising Ministers from each Member State, has been established by Article 9(1)(b) of the SADC Treaty. The SADC Council of Ministers is mandated to oversee the functioning and development of the SADC and to ensure that SADC policies are properly implemented pursuant to Article 11 of the SADC Treaty.
25. Article 9(g) of the SADC Treaty established the SADC Tribunal as the community's judicial organ.
26. The Summit of Heads of State or Government, pursuant to Article 4(4) of the Protocol on the SADC Tribunal, appointed the First members of the Tribunal during its Summit of Heads of State of Government held in Gaborone, Botswana on 18 August 2005. The Tribunal has a complement of ten judges, of whom five are regular members. Ordinarily the Tribunal will sit with three members, and a full bench consists of five members.
27. The Tribunal is an international court applying SADC regional law, relevant international human rights instruments ratified by Member States and

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applicable national law. In terms of the 2000 Protocol, the Tribunal may be approached by SADC Member States, individuals (citizens), private entities and NGOs, and only after the exhaustion of available domestic remedies. As already explained, the 2014 Protocol limits the jurisdiction to disputes between SADC Member States only.

28. Under the 2000 Protocol, the SADC Tribunal was an important forum for citizens and juristic persons, in the event that their domestic judicial system failed to adequately provide for a remedy for violations of their rights and/or violations of the laws of SADC.

The SADC Treaty:

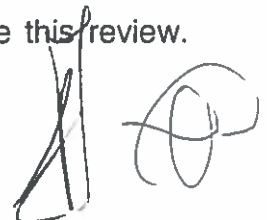
29. The 3rd preambular paragraph of the SADC Treaty observes that there is a need to *"ensure, through common action, the progress and well-being of the people of Southern Africa"*;
30. The 7th preambular paragraph of the SADC Treaty observes that there is a *"need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law"*;
31. Article 4 requires SADC and its Member States to abide by principles of human rights, democracy and the rule of law, equity, balance and mutual benefit as well as the peaceful settlement of disputes;

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32. Article 23 of the SADC Treaty provides that SADC shall seek to involve fully the people of the region and key stakeholders, including the private sector, civil society, non-governmental organisations, workers and employers organisations
33. It is therefore clear from the aforesaid that SADC was brought about by the people's participation including but not limited to, the private sector, civil society, non-governmental organisations, workers and employers organisations, and for their benefit. The vested rights of the aforesaid people (citizens) are of utmost importance.

Events leading to the suspension of the SADC Tribunal and the drafting of a New Protocol on the Tribunal

34. During August 2010, the SADC Ministers of Justice recommended to the SADC Summit in Windhoek, Namibia, that a review of the role, functions and terms of reference of the Tribunal should be conducted.
35. The recommendations emanating from the review were adopted at the SADC Summit of August 2010. Following this SADC resolved not to reappoint or replace those Tribunal Members of the SADC Tribunal whose terms of office had expired, thereby preventing a quorum, and prohibiting the Tribunal from receiving any new cases pending the completion of the review. Attached hereto the minutes as annexure "FA4A"
36. Pursuant to the decision of the SADC Summit, the SADC Secretariat commissioned World Trade Institute Advisors (WTI) to undertake this review.

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WTI submitted its Report on or about February 2011. The recommendations included:

- "a. *The Tribunal shall have jurisdiction over disputes between Member States and between natural or legal persons and Member States, provided that any such natural or legal persons have an interest of a legal nature in the subject matter of the dispute;*
- b. *Amend the SADC Tribunal Protocol to provide for an appellate tribunal to hear appeals from decisions of the SADC Tribunal; and*
- c. *Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the Member State concerned in accordance with domestic procedure governing the execution of judgments against the State."*

37. A copy of the recommendations is attached hereto as annexure "FA4B"
38. In April 2011, the SADC Ministers of Justice considered the Report of the WTI and adopted a set of recommendations which were presented to the Summit on 19 May 2011.
39. In May 2011, the SADC Summit mandated the Ministers of Justice and Attorneys General to continue with their review of the Tribunal and to submit a provisional Report at its August 2011 Summit, and a final Report at its August 2012 Summit. The Summit also extended the moratorium on the Tribunal receiving any new cases or hearing pending cases.
40. On 18 August 2012, the SADC Summit "*resolved that a new protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States.*" This decision further

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extended the suspension of the operations of the SADC Tribunal indefinitely since the first suspension in August 2010.

41. During the course of August 2014 the Attorneys General and Ministers of Justice in the SADC recommended that the Summit adopts the 2014 Protocol. The 2014 Protocol adversely reduces the jurisdiction of the SADC Tribunal rendering it an interstate Court.
42. All deliberations regarding the review of the Tribunal's mandate were conducted solely by the Heads of State and Governments of the SADC Member States, SADC Organs and SADC officials, to the exclusion of the citizens within SADC.
43. The Applicant addressed two letters, dated 28 February 2014 and 24 June 2014, to the First Respondent and the Second Respondent, respectively, wherein a meeting was requested to discuss the Tribunal. I attach copies of these letters as annexures "FA5" and "FA6". Both the First and the Second Respondent's attention were drawn to the memorandum of the SADC Lawyers' Association which was attached to the letters. The SADC Lawyers' Association recommended the following to the SADC Ministers:

"Recommendations to SADC Ministers

- (a) *The ministers must actively engage their respective Heads of State about not adopting a protocol that will dilute the powers, roles and responsibilities of the SADC Tribunal;*
- (b) *The ministers must engage other ministers of justice, during the meeting of SADC Council of Ministers, to be held in Lilongwe, Malawi from 6 March 2014, on the new*

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protocol on the SADC Tribunal with a view to reinstate the tribunal according to its original mandate; and

- (c) *The ministers must encourage the SADC Heads of State and Government to facilitate the wider participation of the citizens of the region in the formulation of a new protocol on the SADC Tribunal.*

44. To date the First Respondent has failed to respond to the aforementioned letter.
45. In the aforementioned letter addressed to the Second Respondent he was informed that:

"The SADC Lawyers' Association desires the restoration of the Tribunal as an essential tool of access to justice and protector of human rights. The Tribunal must not only adjudicate in matters of interstate relevance, it must also attend to matters that are brought by the private society and civil society."

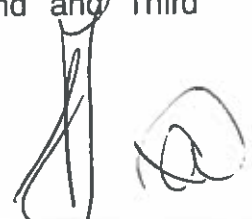
46. The Second Respondent was informed that the Applicant will apply to the Honourable Court for an order in the following terms:

46.1 declaratory orders concerning the role of our Government's responsible entities in the suspension of the Tribunal, termination of Tribunal members and the review of its jurisdiction and its protocol; and

46.2 an order that the responsible entities must undertake the necessary measures to correct a violation and refraining from voting on the Tribunal until such time that violations are corrected.

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47. The Second Respondent's offices acknowledged receipt of the letter and advised that the matter is receiving the Second Respondent's attention. A copy of the correspondence by email is annexed hereto marked Annexure "FA7".
48. The Applicant addressed a further letter, dated 8 August 2014, to the First Respondent, attached hereto marked annexure "FA8". The Applicant contended that:
- 48.1 the decision to suspend the Tribunal and any proposed resolution in support of the 2014 protocol, affects all citizens of the member states including the citizens of South Africa;
- 48.2 requested the President, in accordance with the spirit and purpose of our Constitution and rule of law, to give an undertaking that he will object to the proposed protocol and seek a postponement of the voting on the 2014 Protocol.
49. The First Respondent has not yet responded to this letter.
50. A further letter dated 2 September 2014, was addressed to the Second Respondent by the Applicant to which no response has been received. A copy of the letter is attached hereto marked annexure "FA9".
51. The Respondents are challenged explicitly to be transparent to the Court and to the Applicant [which includes the public at large] and to explain fully the process, the advice and recommendations by the Second and Third

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Respondent to the First Respondent as well as the reasons for such advice, recommendation and conduct. The First Respondent must explain his conduct and the constitutionality thereof.

THE SOUTH AFRICAN CONSTITUTIONAL FRAMEWORK

52. The Constitution provides in section 1 that the Republic of South Africa is one, sovereign, democratic state, founded on the following values:

52.1 human dignity, achievement of equality and the advancement of human rights and freedom;

52.2 non-racialism and non-sexism;

52.3 supremacy of the Constitution and the rule of law;

52.4 universal suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

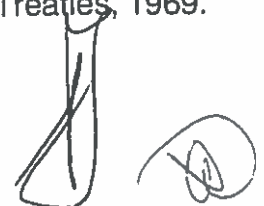
53. In terms of section 2, the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

54. Section 7 provides that the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the

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democratic values of human dignity, equality and freedom. The State must respect, protect, promote and fulfil their rights in the Bill of Rights.

55. Section 231 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). When entering into international agreements, the First Respondent is duty bound to "*respect, protect, promote and fulfil*" the rights contained in the Bill of Rights and any action which is in conflict with these principles is unconstitutional and therefore unlawful.
56. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
57. The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.
58. Section 232 provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
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59. For the purposes of this application, Article 16(2) of the Treaty is paramount. It provides that the Protocol (whether 2000 or 2014) forms an integral part of the SADC Treaty. This informs the procedure to be followed for amending the Treaty as contemplated by the Vienna Convention on Laws and Treaties, 1969.

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60. Our Constitutional Court has laid down the following principles in relation to international agreements:

60.1 Section 7(2) of the Constitution requires the State to "respect, protect, promote and fulfil the rights in the Bill of Rights".

60.2 The national legislative authority vests in Parliament. When exercising this legislative authority, Parliament is bound only by the Constitution and must act in accordance with and within the limits of the Constitution. When exercising its public power, Parliament must act within its constitutional constraints. One of these constraints is that *"there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose"*. Parliament may also not act capriciously or arbitrarily.

60.3 Under our constitutional scheme, it is the responsibility of the executive to develop and implement policy. It is also the responsibility of the executive to initiate legislation in order to implement policy and it is the responsibility of Parliament to make laws. When making laws, Parliament will exercise its judgment as to the appropriate policy to address the situation. This judgment is political and may not always coincide with the views of social scientists or other experts.

60.4 In promoting and expanding our constitutional values to the Southern regions our former State Presidents, Mr Mandela and Mr Mbeki assigned to the SADC Treaty for the benefit of citizens of the Republic

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of South Africa. That decision and the actions thereto have been slowly inhibited by the actions of the First Respondent.

- 60.5 I am advised that the ratification of an international agreement by Parliament is a positive statement to signatories of the aforesaid agreement subject to the provisions of the Constitution, that the Republic will act in accordance with the ratified agreement. International agreements, both those that are binding and those that are not, have an important place in our law. While they do not create rights and obligations in our domestic legal space, international agreements, particularly those dealing with human rights, may be used as interpretive instruments to evaluate and understand our Bill of Rights.
61. In concluding that the Tribunal is a foreign court, the Constitutional Court placed much emphasis on the right of access to courts as the foundation of our Constitution which includes citizens' rights of access to the Tribunal, which is the only court in the SADC.
62. Our Courts have recognized the Tribunal a "*foreign court*" as well as the enforceability of the Tribunal's orders within our jurisdiction.

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THE SADC TRIBUNAL AND PROTECTION OF HUMAN RIGHTS

63. The SADC territory is home to approximately 240 million citizens and many human rights related provisions can be found within the legal framework of SADC.

64. The protection of human rights plays an essential role in economic development as it has an impact on the investment climate which contributes to growth, productivity and employment creation, which is important for the advancement of the citizens' social economic rights.

65. In the past, the Tribunal has been called upon to consider human rights implications of economic policies and programmes, the most obvious example is the matter of Mike Campbell (Pty) Ltd and others vs the Republic of Zimbabwe. The SADC Treaty refers to regional integration and to human rights directly or indirectly at several stages. For instance, in its preamble, the Treaty, *inter alia*, states the following:

"Recognises the need to involve the people of the region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law." (emphasis added)

66. Article 4(c) of the SADC Treaty provides that SADC and its Member States shall act in accordance with the principles of human rights, democracy and the rule of law.



67. The principle of human rights, democracy and rule of law are principles already enshrined in the Constitution and other democratic Member States of SADC. The Treaty confirms that the principles are applicable within SADC.

68. Article 16(1) of the SADC Treaty provides that the primary mandate of the Tribunal is:

"The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it."

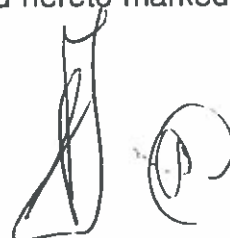
69. Article 16(2) of the Treaty provides that the Protocol forms an integral part of the Treaty

THE CITIZEN'S RIGHTS

70. It is apparent that the jurisdiction of the Tribunal as it now stands inhibits the right of access to justice as well as the advancement and protection of human rights in general.

71. The right of access to justice is guaranteed in our Constitution which has been extended to the SADC Tribunal.

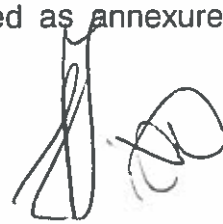
72. The right of access to justice was infringed when the Tribunal was suspended by the Summit. The Tribunal was suspended by the Summit held on 20 May 2011. The First Respondent was represented by the South African High Commission in Namibia. A copy of the communique is attached hereto marked Annexure "FA13"

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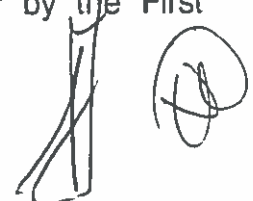
73. The right continues to be infringed by virtue of the fact that the President signed the 2014 Protocol which limits the jurisdiction of the Tribunal between member states only.
74. I am advised that the First Respondent could not deprive the existing rights of citizens without their prior consultation and consent as the rights vests in them. Legal argument will be addressed hereon at the hearing of this application.
75. This is a contravention of the Constitution.
76. The Applicant has called for information and/or reasons from the First Respondent but to date he has refused, despite various demands, the First, Second and Third Respondents failed, refused and/or neglected to reply to the Applicant's request as aforesaid.

CORRESPONDENCE:

77. On 28 February 2014, the Applicant wrote a letter to the offices of the First Respondent requesting an audience with the First Respondent regarding the subject of this matter. A copy of the letter is annexed hereto marked annexure "FA5".
-
78. The First Respondent's Office never replied.
79. On 24 June 2014 a similar letter was addressed by the Applicant to the Second Respondent. A copy of the letter is annexed hereto marked as annexure "FA6".



80. A response was received from the Second Applicant as discussed in paragraph 49 of this affidavit. A copy of the email is annexed hereto marked as annexure "FA7".
81. On 8 August 2014, the Applicant wrote a letter to the offices of the First Respondent, the contents of the letter is self-explanatory and is of importance. A copy of the letter is annexed hereto marked as annexure "FA8".
82. No response was received from the offices of the First Respondent.
83. On 18 August 2014 the Applicant' attorney sent an email to the Third Respondent requesting the Third Respondent to indicate what the Government's point of view is, regarding the proposed protocol, *inter alia*, the limitation of the SADC Tribunal's jurisdiction and access to the Tribunal. A copy of the email is annexed hereto marked as annexure "FA10".
84. On 20 August 2014, Adv André Stemmet from the offices of the Third Respondent replied to the Applicants Attorney's correspondence regarding the summit held in Zimbabwe on 17 and 18 August 2014. He indicated that although the proposed Protocol was adopted, it was at that stage not binding as it was not ratified by the South African Government. A copy of this correspondence is annexed hereto marked as annexure "FA11".
85. On 2 September 2014, the Applicant's Attorney wrote a letter to the Second Respondent enquiring from the Second Respondent what the Government's stance is regarding the ratification of the Protocol voted for by the First

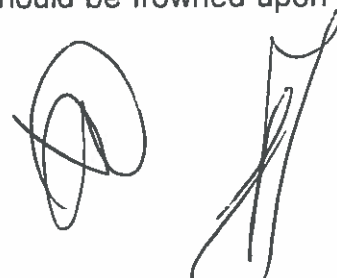
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Respondent, what processes have been commenced with in regards to the ratification of same and at what stage of the process/es is the Government placed. A copy of the letter is attached hereto marked as annexure "FA9".

86. No response was received to this request.
87. Upon drafting of this application Mr L Sigwela, a representative from the office of the Third Respondent, confirmed that the office of the First Respondent had not tabled in Parliament nor in the National Council of Provinces any discussions and/or debates regarding the ratification of the adopted protocol.

CONCLUSION

88. In an open, transparent and democratic society that is envisaged by the Constitution of the Republic of South Africa:
- 88.1 the Applicant and the public at large are entitled to the information and/or reasons requested; and
- 88.2 the Respondents are obliged to furnish the information and/or reasons requested by the Applicant.
89. The Respondent's failure to act as aforesaid since 28 February 2014 until date of signature of this affidavit demonstrates a disregard of the Constitution, the duties conferred upon the Respondents in terms thereof and the rights of citizens of the Republic of South Africa. This conduct should be frowned upon by the Honourable Court.



90. Despite various attempts to determine if any public participation was called for or engaged in, no such evidence could be established. The Respondents are specifically challenged to fully disclose to this Honourable Court any such public participation prior to taking action in voting in favour of a proposal resulting in the deprivation of existing rights of citizens of the Republic of South Africa. The Applicant reserves its rights to supplement to this aspect once the Respondents have disclosed all relevant information in this regard.
91. For the reasons set out above, I pray for an order as set out in the Notice of Motion.



XOLANI MAXWELL BOQWANA

THUS SIGNED AND SWORN TO BEFORE ME at Pretoria on this 11th day of March 2015 the deponent having acknowledged that he knows and understands the contents of this affidavit, that the deponent has no objection to taking the prescribed oath, that the oath which the deponent has taken in respect thereof is binding on the deponent's conscience, and that the contents of this affidavit are both true and correct.



COMMISSIONER OF OATHS

CAREL PIETER FOURIE
COMMISSIONER OF OATHS
FSF LAW CHAMBERS
C/B BROOKLYN ROAD AND BROOKS ST
MENLO PARK, PRETORIA
PRACTISING ATTORNEY, R.S.A.