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The “warm welcome by South Africa of the stealthy introduction of impunified disregard for and violation of fundamental rights”:¹ A legal-political commentary on the SADC Tribunal jurisprudence in South Africa

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In late 2018, the South African Constitutional Court delivered judgment in *Law Society of South Africa v President of the Republic of South Africa*, which had been referred to it by the North Gauteng High Court. The

1 This was the unsettling yet incontrovertible pronouncement made by Chief Justice Mogoeng in delivering judgment in the Constitutional Court in *Law Society of South Africa v President of the Republic of South Africa* 2018 ZACC 51 (11 December 2018).

matter concerned the constitutionality of former president Jacob Zuma's support for and signing of the infamous 2014 Southern African Development Community (SADC) summit protocol, which has deprived the people of the SADC region from recourse to the SADC Tribunal. In short, the Constitutional Court confirmed both the finding that the signing of the protocol was unconstitutional, and the order for the president's signature to be removed, exactly as the high court had ruled. While welcoming the judgment, this contribution explores whether the ruling offers credible hope to SADC citizens and represents an important milestone for South Africa and the region. Or is it a token victory for constitutional democracy and the rule of law? A discussion of the judgment, supplemented by references to other case law and literature, leads to two conclusions: Firstly, it is evident that the South African constitutional scheme is extensive in reach, and the Constitution is central in the interpretation of treaty and customary international law. While the majority judgment ironically deviates from this, instead focusing more on the dictates of international law, the minority judgment clearly locates the grounds for reviewing the former president's conduct in his failure to respect the rights in our Constitution. Secondly, the order to un-sign the protocol could be seen as an opportunity for South Africa to recommit to justice, the rule of law, human rights and the key values of democracy. The South African president did eventually withdraw South Africa's signature from the protocol but the question remains whether the judgment and the un-signing of the protocol are token victories for maintaining the rule of law, particularly fostering access to justice in a regional court for ordinary citizens, in South Africa and the sub-Saharan region. It is one thing to un-sign a contentious protocol that divested the region's people of an avenue of access to justice; it is another to repair the damage that was caused by the events discussed later which effectively dismantled the SADC tribunal; something about which the political elite has remained silent.

Keywords: SADC Tribunal, SADC summit protocol, South African Constitutional Court, jurisprudence, constitutional democracy, human rights, rule of law

Introduction

"Can you imagine how terrible it must be not to be able to voice your complaint anywhere?" Those were my father's words to me many years ago in the context of the inequities of apartheid. A lot has changed in South Africa since then. Or has it? Section 34 of the Constitution of the Republic of South Africa (RSA 1996) has

entrenched the right to have one's dispute settled by application of the law by an objective and independent court or tribunal. And across the globe, in order to expand access to justice, academics and experts in various fields are working to establish alternative dispute resolution mechanisms. Yet in 2014, then President Jacob Zuma voted for and signed the now infamous Southern African Development Community (SADC) summit protocol that no longer made the protection of SADC laws available to individuals, but only governments in the region (Fritz 2014).

This paper scrutinises the judgment of the North Gauteng High Court in *Law Society of South Africa v President of the Republic of South Africa* (2018 6 BCLR 695 (GP) (1 March 2018)) as well as the subsequent judgment in the same matter in the Constitutional Court (2018 ZACC 51). Both these judgments concern the former South African president's actions by which he divested ordinary South Africans and citizens of the SADC region of an avenue to access justice through the now defunct SADC Tribunal. In short, the Constitutional Court confirmed the North Gauteng High Court's finding that the signing of the protocol was unconstitutional, as well as the order for the president's signature to be removed. But, although both court judgments are welcomed, are they perhaps only token victories for constitutional democracy and the rule of law, or can they be regarded as important jurisprudential milestones for South Africa and the SADC region? Do they offer credible hope to SADC citizens that, having exhausted all local remedies, they could in future seek redress in a regional court such as the SADC Tribunal, once hailed as the gatekeeper for human rights and rule-of-law infringements by member states against citizens?

These questions will be answered with reference to the judgments themselves, along with parallel references to literature and relevant case law. Also informing the paper are the so-called Fick judgments, where applicants in an earlier SADC Tribunal matter turned to the South African courts and managed to register the tribunal's cost order in their favour against the Republic of Zimbabwe (*Government of the Republic of Zimbabwe v Fick* (47954/2011, 72184/2011, 77881/2009) 2011 ZAGPPHC 76 (6 June 2011); 2012 ZASCA 122; 2013 5 SA 325 (CC)).

Background

In 1992, the SADC Tribunal was established in terms of article 9 of the SADC treaty. In terms of article 15 of a subsequent protocol to the treaty (SADC 2000), the tribunal's jurisdiction included affording individuals direct access against governments.

On 11 October 2007, the private Zimbabwean company Mike Campbell (Pty) Ltd as well as William Michael Campbell filed an application with the SADC Tribunal, challenging the Zimbabwean government's acquisition of a pocket of agricultural land (*Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* (2/2007) 2008 SADCT 2 (28 November 2008)). Having relied on article 4(c) of the SADC treaty, which required SADC member states to act in accordance with human rights, democracy and the rule of law, the tribunal found that the applicants had been racially discriminated against. The tribunal concluded that the applicants had been deprived of their land without having had any right of access to the Zimbabwean courts, nor the right to a fair trial – both essential elements of the rule of law. However, the Zimbabwean government subsequently declared in public that it did not consider it bound by the tribunal's judgment.

In 2011, the SADC heads of state issued a communiqué in which they placed a moratorium on the tribunal's mandate to hear new cases (SADC 2011; Christie 2011) and conveyed the organisation's intention not to reappoint or replace the tribunal's 10 judges. This decision was later labelled as "illegal and in bad faith" by four of the tribunal's judges (Christie 2011). A year later, it was announced that a protocol "for a new tribunal would be negotiated and its jurisdiction would be limited to the adjudication of disputes between member states" (Fritz 2014). This new protocol was the one approved at the SADC summit in 2014. It would appear, therefore, that as soon as the SADC Tribunal dared to decide against the "Mugabe-led Zimbabwean government" (Fritz 2014), heads of state relegated to the back of their minds the fact that individual access to the tribunal had been agreed in terms of the original SADC treaty.

Meanwhile, in light of the Zimbabwean government's contemptuous response to the tribunal judgment, some of the applicants in that case approached the North Gauteng High Court in South Africa in 2010 to register the tribunal's judgment in South Africa in an attempt to enforce the cost order by execution against Zimbabwean property in this jurisdiction (*Government of the Republic of Zimbabwe v Fick* (47954/2011, 72184/2011, 77881/2009) 2011 ZAGPPHC 76 (6 June 2011)). After the high court granted the relief, the Zimbabwean state approached the South African Supreme Court of Appeal to reverse the decision ((657/11) 2012 ZASCA 122 (20 September 2012)), but their appeal failed, as did their subsequent appeal to South Africa's Constitutional Court (2013 5 SA 325 (CC); also see De Wet 2013; Woolaver 2016).

The final piece of the puzzle came in 2015, when the Law Society of South Africa and six applicants who had been landowners in Zimbabwe applied to the Gauteng High Court (*Law Society of South Africa v President of the Republic of South Africa* 2018 6 BCLR 695 (GP) (1 March 2018)) for declaratory relief in respect of the

conduct of the executive, particularly the South African president, in (a) voting in support of the 2011 SADC summit motion that effectively suspended the tribunal's operation, and (b) signing the 2014 protocol that turned the tribunal into a body that no-one in the region but governments would be able to access. The high court declared the South African president's conduct "as unlawful, irrational and thus unconstitutional" (par 72) and ordered the president to retract his signature from the 2014 revised SADC Tribunal protocol. In terms of section 172(2) of the Constitution, the order was referred to the Constitutional Court for confirmation.

Key features of the Constitutional Court judgment

The decision the Constitutional Court was asked to confirm

In granting the relief sought by the applicants, the Gauteng High Court firstly held that the impugned conduct of the South African executive was irrational, because it could never contribute to the purpose of the SADC treaty and the first protocol of the tribunal (par 61-62 of the high court's judgment). Further proving the irrationality of the South African president's signature to the 2014 (amended) tribunal protocol was that it could not be rationally linked to any "legitimate Government purpose authorized by section 231 of the Constitution and the SADC Treaty" (par 68). Secondly, the court held that any conduct by the executive detracting from the SADC Tribunal's ability to exercise its "human rights jurisdiction, at the instance of individuals, was inconsistent with the SADC treaty" and, therefore, violated the rule of law (par 63). The way in which the SADC summit had attempted to divest the tribunal of jurisdiction, the court said, was "illegally contrived" and "a conspiracy initiated by the President Mugabe-regime in Zimbabwe to undermine an essential SADC institution's ability to enforce a fundamental SADC objective" (par 64). This, unfortunately and despite president Ramaphosa's subsequent un-signing of the protocol, therefore remains the unfortunate reality for citizens of the SADC region; this is what the Constitutional Court was asked to confirm.

The Constitutional Court's judgment

The Constitutional Court delivered a majority (6) and minority (4) judgment, agreeing on the relief granted by the high court in respect of the constitutional invalidity of the president's impugned conduct. Where the majority and minority judgments differed, however, was in their approach and reasoning in arriving at this decision: In essence, while the majority judgment delivered by Chief Justice Mogoeng located both the unlawfulness and irrationality of the president's

conduct in international law and norms, judges Cameron and Froneman in their minority judgment preferred locating it primarily in the South African Constitution (par 98-105 of the Constitutional Court judgment). Even though this difference may seem insignificant at first glance, I argue below that it demonstrates the power and encompassing reach of the South African constitutional scheme, particularly with reference to the protection of human rights and the rule of law.

It must also be mentioned that the minority judgment was strongly reminiscent of the majority judgment on the encompassing reach of the Constitution in *Glenister v President of the Republic of South Africa* (2011 3 SA 347 (CC)) delivered by judges Moseneke and Cameron. Without digressing into the details, that judgment clearly located government's duty to combat corruption in the Constitution (par 401). The fact that South Africa was a signatory state to international anti-corruption conventions merely served as a tool to interpret the constitutional obligation.

The following sections explore two key features of the Constitutional Court judgment. These relate to the role and place of international law in South Africa's constitutional dispensation (Swanepoel 2013), and the un-signing of the 2014 amended SADC protocol.

The role and place of international law in South Africa's constitutional order

The minority judgment stated that, while it was true that because the president held office under the Constitution, his unconstitutional conduct may ex officio be attributed to the Republic of South Africa, the president could not, in this or any other capacity, "directly fall foul of the international law of treaties" (par 99). Since only sovereign states or international organisations, which the court referred to as "creatures of international law", had the capacity to become party to an international treaty, only they could by implication breach an international treaty. In this regard, the minority judgment held:

As a subject of international law itself, South Africa is bound by the Vienna Convention and the Treaty. But, directly, the President is not. The President is bound by the Constitution. It is the Constitution that enswathes the President with the obligation to ensure that his conduct does not result in a breach of South Africa's international obligations (par 100).

Through his impugned conduct, the former President failed to comply with his obligation under the Constitution to "respect, protect, promote and fulfil" the rights in the Bill of Rights". This reasoning the minority judgment also applied in relation to the irrationality-of-conduct finding, arguing as follows (par 103-104):

Once we locate the ground for reviewing the President's conduct in the Constitution, and the Constitution alone – in the failure to 'respect, protect, promote and fulfil' South Africa's international law commitments to access to justice for its people, we are spared unnecessary complexity. We do not need to examine the tangled question of when and how an international treaty becomes domesticated within South Africa.

At the start of the majority judgment, Chief Justice Mogoeng made two things abundantly clear: firstly, that the judiciary would continue to be slow to impose obligations on government "which will inhibit its ability to make and implement policy effectively" (par 2), but, secondly, that this did not mean that the president and the executive of South Africa were free to exercise their powers in an "unguided" or "unbridled" fashion. The exercise of such powers still needed to conform to the constitutional scheme, the Bill of Rights and both domestic and international law obligations (par 3). The court next considered the centrality of international law "in shaping our constitutional order". And although the statements regarding the role of international law in bringing about the end of apartheid were tried and true, the Chief Justice seemed to imply that this was the reason why international law had the status and played the role it did in the South African legal system (par 4).

In my view, which happens to align with the minority judgment, international law, including customary international law, finds its status and recognition in sections 231 to 233 of the Constitution (RSA 1996). Therefore, while international law is significant, it always remains subject to passing constitutional muster. The recognition of international law in our domestic system is therefore not a slavish or routine recognition. Firstly, treaties, unless self-executing, must be incorporated into domestic law in terms of the prescripts of section 231 of the Constitution, and secondly, in terms of section 232, customary international law is law in South Africa unless it is inconsistent with the Constitution or an act of the South African parliament. To date, no South African court has had to declare customary international law inconsistent with the Constitution to find executive conduct constitutionally invalid. Thus far, such constitutional invalidity has always been grounded in the Constitution. In my view, this is because the South African constitutional scheme, from a human rights perspective, is so all-encompassing that no South African court would probably ever have to look much further than the Constitution.

Two examples illustrate this extensive reach of the constitutional scheme and the centrality of the Constitution in the interpretation of treaty and customary international law: The first example is the well-known Al-Bashir judgments (*The Minister of Justice and Constitutional Development v The Southern African*

Litigation Centre (867/15) 2016 ZASCA 17 (15 March 2016); *The Prosecutor v Omar Hassan Ahmad Al-Bashir* ICC-02/05-01/09-302), and the finding that the South African government had a duty to arrest the now ousted Sudanese head of state when he entered South African territory. Despite the fact that such obligation had arisen from a treaty and that customary international law continued to recognise immunity for serving heads of state, the duty to arrest Al-Bashir was primarily grounded in the Constitution. The second example can be found in the Fick judgments I referred to earlier. There, the Constitutional Court developed the common law so as to include the SADC Tribunal's judgment as a judgment of a "foreign court" to make such an order susceptible to the enforcement jurisdiction of a South African court. The court found justification for doing so in both article 32(1) of the tribunal protocol of the amended SADC treaty, and the injunctions of the South African Constitution. On its obligation to develop the common law, the court declared:

Added to this [article 32 of the tribunal protocol in the amended SADC Treaty], are our own constitutional obligations to honour our international agreements and give practical expression to them, particularly when the rights provided for in those agreements, such as the Amended Treaty, similar to those provided for in our Bill of Rights, are sought to be vindicated. We are also enjoined by our Constitution to develop the common law in line with the spirit, purport and objects of the Bill of Rights.

So, viewing the jurisprudence in relation to the former president's handling of the SADC Tribunal against this backdrop, it is clear that the majority judgment of the Constitutional Court – ironically – substantially deviated from the standard that the Constitution demands. Instead, the court chose to focus on the dictates of international law about what is constitutionally expected from a president or executive.

The court order and the un-signing of the protocol

In its order, excluding the cost order, the Constitutional Court confirmed the Gauteng High Court's order for constitutional invalidity (par 97). This was done on the following terms: (a) The president's participation in the decisions made, along with "his own" decision to suspend the SADC Tribunal, was unconstitutional, unlawful and irrational. (b) The president's signing of the 2014 protocol on the tribunal was unconstitutional, unlawful and irrational. (c) The president was directed to withdraw his signature from the 2014 protocol. It is this order to un-sign the SADC protocol that I would like to linger on next.

At the outset, it is important to note that this is not about the un-signing of a “treaty” as such, but an amended protocol – as a part of the original SADC treaty – which the president and other SADC leaders had signed, thereby divesting individuals from access to the tribunal. Therefore, this case presented an unprecedented situation, even in international terms, with the closest recent precedent being the un-signing of the Rome Statute by the United States of America at the turn of the century (Seguin 2000; Franck & Yuhan 2003). To add to an already challenging matter, the original SADC treaty as it pertains to the spirit and purport of SADC and its organs remained unchanged. In discussing the “legal consequences of treaty signature and unsignature under international law”, McLaurin (2006) confirms that the Vienna Convention on the Law of Treaties “codifies the customary international law rules regarding treaty formation, termination and interpretation” (also see Dugard 2012:414). Yet article 18 of the Vienna Convention is not clear as to the un-signing of treaties in customary international law (McLaurin 2006:1948). According to McLaurin (2006:1948-1949), un-signing a treaty can have two possible effects: The first is simply that the state may thereby signify that it no longer wishes to become a party to the treaty, and is therefore relieved of the interim obligations it incurred when it initially signed the treaty. The second is that the un-signing may be perceived as an action that “defeats the object and purpose of the treaty”.

In describing the president’s impugned signing of the revised protocol as “weighty and significant”, the Chief Justice clearly had McLaurin’s second effect in mind in confirming the order to un-sign the protocol. The court held that the president’s impugned signature had announced to all “that South Africa is about to make a radical paradigm shift that is inextricably tied up to who we are as a nation”. More specifically, the signature had signalled that “access to justice, a commitment to the rule of law and the promotion of human rights” was no longer a prominent feature of South Africa’s national vision based on which the country conducted its international relations (par 31). Finally, the court ruled, the signature had signified to SADC member states that South Africa was shunning its responsibility to protect and promote the key values of democracy. The Chief Justice concluded as follows (par 32):

Our President’s signature is symbolic of a warm welcome by South Africa of the stealthy introduction of unpunished disregard for and violation of fundamental rights or key Treaty provisions. It inadvertently but in reality reassures all others that we would turn a blind eye to human rights abuses and non-adherence to the rule of law in their jurisdictions even if it affects our people.

As unsettling and, perhaps, uncomfortable the Chief Justice’s remarks were, the sentiments he expressed did not come as a complete surprise, but had in fact been a long time coming. This “impunished disregard for and violation of

fundamental rights” was particularly evident from the so-called Zimbabwean “torture case” jurisprudence (*National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2018 1 SA 315 (CC); *South African Police Service v Southern African Human Rights Litigation Centre* 2013 ZASCA 168 (27 November 2013)) as well as academic literature (Swanepoel 2014). It was equally clear to see from the earlier cited Al-Bashir judgments in the Supreme Court of Appeal and the International Criminal Court (Swanepoel 2015; 2018(a); 2018(b)). Academic commentators have been commenting on South Africa’s regression for a number of years (Swanepoel 2016; 2017). De Wet (2013) has said that the SADC summit decision to suspend the SADC Tribunal may be ascribed to the organisation’s poor understanding of the legal implications of the SADC Treaty regime and their “scant respect for legal obligations”. She concludes that most SADC member states have poor domestic track records for the protection of human rights and judicial independence. Sadly, this is true and again, despite the fact that the current president heeded the Constitutional Court’s order to un-sign the protocol which dismantled the SADC Tribunal (Ngatane N. Eyewitness News 18/08/2019), the SADC region is now without a regional court which had the potential to make a huge contribution towards holding rogue governments accountable to ordinary citizens.

What’s more, however, is that three years prior to the formal 2014 decision to suspend the tribunal, the report by Professor Lorand Bartels, who had been appointed to conduct an independent review of the tribunal and its legal powers, informed SADC that suspension of the tribunal would be tantamount to a violation of their international legal obligations (Cowell 2013). Therefore, as they intentionally went against the Bartels report, the SADC summit and South Africa’s former president could not credibly plead ignorance of its obligations, as De Wet seems to suggest. On the contrary, their actions demonstrated a wilful and arrogant disregard for human rights and the rule of law, and a complete lack of political will to fulfil their legal obligations.

It stands to the credit of the current South African government that the president did un-sign the protocol which dismantled the SADC Tribunal with its former jurisdiction to hear cases brought by individuals against their governments. The question now is what role South Africa and other political leaders in the SADC region will play to repair the damage by re-instating a SADC Tribunal, which again, will allow individual access to citizens who have exhausted their local remedies in order to hold their governments accountable for human right infringements. Up to now, the SADC political elite was only willing to have a SADC Tribunal with jurisdiction over inter-state disputes. This effectively divests individuals, particularly members of minority groups, with recourse against governments which discriminated against them.

Conclusion

Ideally speaking, the South African government now has a golden opportunity to signal to fellow SADC states and the world at large that it is recommitting the country to the ideals, values and purpose set out not only in the South African Constitution, but in the numerous treaties and international conventions aimed at protecting basic human rights and fostering the rule of law. That, however, would require the necessary political will. The un-signing of the protocol which dismantled the Tribunal with its original jurisdiction to hear cases brought to it by individuals was a step in the right direction. There is however no indication as yet that South Africa is leading by example, and despite the dire pronouncements of the South African courts, to restore the previous jurisdictional ambit of the SADC Tribunal.

A most disturbing concern is the little attention this matter has received in the public domain. Perhaps it is to be expected in a developing country where the attention of most members of civil society is captured by elementary and glaringly preposterous public issues, which have almost become a fixture in the South African political landscape over the past few years. The country's ruling elite are quick to publicly declare their commitment to our constitutional values. Yet the jurisprudence discussed here shows that the executive, along with other executives in the SADC region, "illegally contrived" (as the Gauteng High Court said in par 64) to divest South Africans and fellow SADC citizens of one of the most essential components of the rule of law, namely access to justice. There are other examples of the arrogance with which governments rule and its consequences for the rule of law and protection of human rights in the African region.

The current animosity displayed by the African Union and South Africa towards the International Criminal Court (ICC) clearly emanates from that court's indictment of Libya's Muammar Gaddafi and Sudan's Omar al-Bashir. Similarly, the former Zimbabwean president's alleged leading role in Matabeleland's 1982-1986 genocide is an atrocity rarely mentioned these days (Simpson 2008; Reid 2008). According to Shaw (1997:10), "(n)o matter what theory of law or political philosophy is professed, the inextricable bonds linking law and politics must be recognized". This is particularly true of South Africa's "silent diplomacy" towards Zimbabwe (Adelmann 2004), which has become ever more silent since the systematic decline of the rule of law in that state.

Although Zimbabwe is currently considered unstable, and this instability has spilled over to South Africa, where incidents of xenophobia, including attacks on Zimbabwean citizen-refugees, are widespread (Munyoro 2015; Patel 2013(a); 2013(b); Dzimwasha 2014; Chiumia 2013), the Zimbabwean situation cannot be typified as a national armed conflict. And since South Africa is in any event

home to thousands, perhaps millions, of refugees from other African states, the Zimbabwean situation does not warrant the United Nations (UN) Security Council exercising its powers in terms of chapter VII of the UN convention by, for example, referring some of the most heinous acts against civilians to the ICC. In any case, given African states' reservations about the ICC and universal jurisdiction, and particularly also the prevailing lack of political will in South Africa and on the rest of the continent, a referral of the Zimbabwean situation is highly unlikely (Du Plessis 2012; Chenwi 2014).

In response to the widely recorded human rights atrocities committed by the Mugabe regime over decades since the country gained its independence, the South African government persisted with its policy of quiet diplomacy (Adelmann 2004:249; Mhango 2011:11). And the situation has not improved since President Emmerson Mnangagwa has taken over from Mugabe (Gavin 2019). It falls outside the scope of this article to argue for or against quiet diplomacy with rogue regimes. Suffice it to say, therefore, that since South Africa's adoption of this policy towards Zimbabwe, nothing has transpired to foster accountability for gross violations of human rights in that state. It seems unimaginable, given the apparent bonhomie and good will among SADC political leaders, that there has not been a single moment to sit down with a leader such as President Mnangagwa, urging him to try to redevelop Zimbabwe for the benefit of not only the long-suffering Zimbabwean population, but for the economic benefit of the SADC region as a whole.

Yes, the judgments in *Law Society of South Africa v President of the Republic of South Africa* and the prior Fick judgments can indeed be regarded as a step in the right direction – not only for constitutional democracy and the rule of law in South Africa, but also for a fairer dispensation for the people of the SADC region. These judgments have demonstrated the South African courts' commitment to the country's constitutional system, including the state's international obligations. The judgments have also demonstrated the wide reach of South Africa's constitutional scheme: While international law and the country's obligations in terms thereof are regarded in a serious light, their interpretation remains firmly rooted in the Constitution and its provisions. Now it is up to members of civil society to get educated as to the dictates of constitutional democracy, and hold government to account. Only then, these judgments will have been more than token victories.

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