Article

The South African Constitutional Court Judgment Concerning the Suspension of SADC Tribunal: Critiquing the Critics of the Constitutional Court

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Abstract

This article discusses the various scholarly critiques of the South African Constitutional Court judgment in *Law Society of South Africa & Others v President of the Republic of South Africa & Others*. While we discuss and analyse the articles by some of the scholars who have critiqued the decision, we pay more attention to the criticism by Tladi in particular. We point out that Tladi failed to properly locate the main basis of the Constitutional Court's decision. We also disagree with Tladi's assertion that the SADC Treaty and the 2000 Tribunal Protocol could be amended through any means other than the three-quarters majority of the SADC Summit as required by the SADC Treaty. Further, we disagree with Tladi's view that the doctrine of subsequent practice is applicable in this case and that it was correctly applied in the adoption of the 2014 Tribunal Protocol.

Keywords: SADC Tribunal; SADC Summit; South African Constitutional Court; International Law; Access to Justice

UNISA university of south africa PRESS

Comparative and International Law Journal of Southern Africa
https://unisapressjournals.co.za/index.php/CILSA
Volume 54 | Number 2 | 2021 | #9506 | 26 pages

https://doi.org/10.25159/2522-3062/9506
ISSN 2522-3062 (Online), 0010-4051 (Print)

Introduction

The recent judgment of the South African Constitutional Court in *Law Society of South Africa & Others v President of the Republic of South Africa & Others* (Constitutional Court judgment)[1] has aroused serious academic attention. At the time of writing this article, no less than ten academic articles on the decision have already been published.[2] Generally, all the scholars discussed in this article agree that in suspending the Southern African Development Community (SADC) Tribunal and in subsequently adopting the 2014 Tribunal Protocol, the SADC Summit violated the provisions of the SADC Treaty. As demonstrated in this article, some scholars, while ultimately agreeing with the conclusion reached by the South African Constitutional Court, take issue with the basis of the court's conclusion; while others seek to advance the argument that there are international law principles that justify the impugned decisions of the SADC Summit. Whilst the different critiques of the Constitutional Court judgment are welcome as they enrich jurisprudence, we caution against unwarranted attack on the Constitutional Court. This is particularly so since the SADC Tribunal issue is yet to be resolved and its resolution will most likely lie in the political arena. Unwarranted criticism of the reasoning of the South African Constitutional Court may have the unintended consequence of emboldening the political leaders of SADC (the members of the SADC Summit) into believing that somehow their actions were legally justifiable, yet the inescapable conclusion is the one that was reached by the South African Constitutional

1 *Law Society of South Africa & Others v President of the Republic of South Africa & Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018).

2 See Neels Swanepoel, 'The "Warm Welcome by South Africa of the Stealthy Introduction of Impunified Disregard for and Violation of Fundamental Rights": A Legal-Political Commentary on the SADC Tribunal Jurisprudence in South Africa' (2020) 52(1) Acta Academica 165–179; Moses Phooko and Mkhululi Nyathi, 'The Revival of the SADC Tribunal by South African Courts: A Contextual Analysis of the Decision of the Constitutional Court of South Africa' (2019) 52(1) De Jure 415–432; Andreas Coutsoudis and Max du Plessis, 'We are All International Lawyers: Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law' (2020) 10 Constitutional Court Review 155–195; Dire Tladi, 'The Constitutional Court's Judgment in the *SADC Tribunal* Case: International Law Continues to Befuddle' (2020) 10 Constitutional Court Review 129–153; Sanya Samtani, 'International Law, Access to Courts and Non-retrogression: *Law Society v President of the Republic of South Africa*' (2020) 10 Constitutional Court Review 197–225; Sebastian Bates, '*Law Society of South Africa & Others v President of the Republic of South Africa & Others* 2019 (3) (CC) Constitutional Court of South Africa, December 11, 2018' (2020) 114(2) American JIL 275–281; Moses Phooko, 'A Call for Public Participation in the Treaty-making Process in South Africa: What can South Africa Learn from the Kingdom of Thailand?' (2020) 53(1) CILSA 1–22; Moses Phooko, 'Has the SADC Tribunal been Salvaged by the South African Constitutional Court and the Tanzanian High Court?' (2020) 34(2) Speculum Juris 174–187; Moses Phooko, 'Revisiting the Monism and Dualism Dichotomy: What does the South African Constitution of 1996 and the Practice by the Courts Tell Us About the Reception of SADC Community Law (Treaty law) in South Africa?' (2021) 29(1) AJICL 168–182.

Court—not only were their actions in violation of the SADC Treaty, but they also acted in bad faith.

While this article looks at several articles that critique the Constitutional Court judgment, it pays more attention to the one by Tladi, as we believe it contains errors and contradictions that cannot go unchallenged. Two of these errors stand out. The first is the failure to properly locate the basis of the Constitutional Court's decision. The second is his failure to properly construe the legal framework of the SADC Summit decision-making process; and his concomitant failure to properly articulate the doctrine of subsequent practice. As shall be shown later in this article, it was not even necessary for Tladi to dwell on the subject of how the SADC Summit takes its decisions, as this was not an issue, let alone a contested one, before the Constitutional Court.

Tladi's attack on the Constitutional Court is bare-knuckled—portraying it as a court not yet sophisticated enough to handle international law issues; particularly the court's alleged lack of grasp of what he calls 'the methodology of international law', yet the author himself struggles to support this rather serious charge, let alone unpack this 'methodology of international law' that the Constitutional Court allegedly failed to apply in its determination of the case.

While the Constitutional Court judgment may not be one of the most elegantly written judgments, the reasoning of the court, the basis of that reasoning and its conclusions are unmistakably clear to follow. This is best illustrated by the last part of paragraph 48 of the Constitutional Court judgment:

> Both Houses of our Parliament resolved, in terms of the predecessor of section 231(2) of our Constitution, to ratify the Treaty. For this reason, no constitutional office-bearer, including our President may act, on behalf of the State, contrary to its provisions. […] And there was and still is no legal basis for the President to act contrary to the unvaried provisions of a binding Treaty.[3]

As has already been intimated, this article is a critique of several articles that have analysed at length the Constitutional Court judgment. This article is therefore framed in the style of a response, with the assumption that the reader is already aware of the underlying discourse. However, for purposes of completeness and coherence; and to aid reader recall, we set out a brief background to the Constitutional Court judgment in the next section. We then frame a summary of what we deem to be the core jurisprudence emanating from the Constitutional Court. We then set out summaries of and analyse some of the different academic critiques that have been published. In so doing, we concentrate on what we view as the major criticisms advanced by the scholars. We then

3 Constitutional Court judgment para 48.

turn to address and analyse the issues that have been raised by Tladi, before making our conclusion.

Background to the Constitutional Court Judgment

The Constitutional Court judgment is a culmination of political and legal processes that were triggered by the decision of the SADC Tribunal in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (*Mike Campbell* judgment).[4] That case dealt with Zimbabwe's controversial land reform programme. The applicants had challenged section 16B of the Constitution of Zimbabwe (Amendment 17 of 2005) which permitted the government to expropriate land without compensation and barred the Zimbabwean domestic courts from dealing with land expropriation disputes.[5] The applicants had argued that Zimbabwe's actions violated the principles of human rights, democracy and the rule of law as provided for in the SADC Treaty. The applicants had further argued that the land reform programme unfairly discriminated against them on the ground of race.[6] The SADC Tribunal had to first determine whether it had the human rights jurisdiction to preside over the case and if so, whether the applicants' human rights had been violated. The SADC Tribunal ruled in the affirmative on both issues. On the issue of discrimination on the ground of race, the SADC Tribunal determined that even though Amendment 17 of 2005 was silent on race, its effect would be felt only by white farmers who owned the majority of agricultural land.[7] It therefore ruled in favour of the applicants and found that the applicants had been discriminated against. The Tribunal then ordered the Republic of Zimbabwe, among other things, to pay compensation for the land expropriated from the applicants.[8]

Zimbabwe refused to comply with the orders issued in *Mike Campbell*,[9] and played a key role in efforts that resulted in the SADC Summit initially suspending and eventually effectively disbanding the SADC Tribunal.[10] In 2014, the SADC Summit adopted the Protocol on the Tribunal in the Southern African Development Community (2014 Tribunal Protocol) which, among other regressive provisions, limits the jurisdiction of the Tribunal to inter-state disputes.[11] It was the participation of the President of South Africa in the processes that resulted in the adoption of the 2014 Tribunal Protocol which

4 *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007); [2008] SADCT 2 (28 November 2008).

5 ibid 12.

6 ibid 18.

7 ibid 12.

8 ibid 59.

9 See for example, *Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); Solomon Ebobrah, 'Tackling Threats to the Existence of the SADC Tribunal: A Critique of Perilously Ambiguous Provisions in the SADC Treaty and the Protocol on the SADC Tribunal' 2010 (4) Malawi Law Journal 200.

10 Constitutional Court judgment para 44.

11 Phooko and Nyathi (n 2) 420–421.

led the Law Society of South Africa and others to challenge the South African President's involvement in the aforesaid processes before the domestic courts of South Africa.

In 2015, the Law Society of South Africa and others approached the High Court of South Africa seeking a declaratory relief to the effect that the South African President's participation in the suspension of the operations of the SADC Tribunal and his signing of the 2014 Tribunal Protocol were unlawful, irrational and unconstitutional.[12] The issue before the court was whether the President acted in compliance with the provisions of the SADC Treaty and the South African Constitution when he participated in the processes that sought to create a new tribunal. The court had to consider the rationality of those actions. The High Court ruled in the favour of the applicants and held that South Africa remains bound by the SADC Treaty and the 2000 Tribunal Protocol.[13] It therefore declared that the President's participation in the suspension of the SADC Tribunal and his signing of the 2014 Tribunal Protocol were in breach of SADC Treaty provisions and were therefore unlawful, irrational and unconstitutional.[14] The High Court then referred its order to the Constitutional Court for confirmation.

The Constitutional Court confirmed the order of constitutional invalidity made by the High Court and, inter alia, directed the President to withdraw his signature from the 2014 Tribunal Protocol.[15] It held that in disbanding the SADC Tribunal and purporting to replace it with a weaker one and, in doing so contrary to the provisions of the SADC Treaty, the SADC Summit acted unlawfully and irrationally.[16] Consequentially, the South African President's participation in the decision-making processes, his own decisions to suspend the operations of the SADC Tribunal and his signature on the 2014 Tribunal Protocol were, by reason of sections 7(1) and (2) and section 8(1) of the South African Constitution, held to be unconstitutional, unlawful and irrational.[17]

In the final analysis, the jurisprudence coming out of the Constitutional Court judgment is that the constitutional injunction that the President of South Africa must always act rationally and lawfully in the exercise of the functions of the office of President, is not only limited to South Africa's domestic affairs. That injunction remains valid even in the conduct of the President's international relations on behalf of South Africa.[18]Among

12 Constitutional Court judgment para 1.
13 ibid para 71.
14 ibid para 72.
15 ibid para 97.
16 ibid 53–56.
17 ibid para 93.
18 Phooko and Nyathi (n 2) 416.

other things, this means that the President cannot act contrary to provisions of a treaty approved (ratified) by parliament.[19]

This is the decision that has resulted in various academic views which we address below, with our main focus being on Tladi's arguments.

An Overview and Critique of Various Academic Views

Building on their previous academic work,[20] Coutsoudis and Du Plessis locate and analyse the Constitutional Court judgment within the broader context of the evolving South African jurisprudence, itself anchored in the South African Constitution, which seeks to integrate international law into South Africa's domestic law.[21] The authors set out several constitutional provisions that prescribe the status of international law in South Africa, for example, section 232, which provides that customary international law is law (in South Africa) unless it is inconsistent with the Constitution or an Act of Parliament;[22] and section 233 which provides that in interpreting legislation, courts must prefer any reasonable interpretation of legislation that is consistent with international law over any interpretation which is inconsistent with international law. Also, there is section 39(1) (b) which peremptorily enjoins every court to consider international law when interpreting the Bill of Rights.

While Coutsoudis and Du Plessis are open to the possibility of conflict between international law and the South African Constitution, they reason, with regard to customary international law, that while ultimately the South African Constitution would take precedence over international law as prescribed by the Constitution itself,[23] in terms of practice however, there is little prospect that the South African Constitution will find itself in conflict with any peremptory norms (*jus cogens*) of international law. They further reason that in the case of non-peremptory norms, there should not be any challenges as the South African government is under an 'obligation to conduct South Africa's international relations in a manner that is informed by and gives effect to the Constitution and the Bill of Rights.'[24] The expectation would be that with regard to non-peremptory norms, South Africa should persistently object to customary international law (during the process of formation of those international customary norms) that is in conflict with the South African Constitution so that such norms do not bind South Africa.[25] With regard to conflict between the South African Constitution and

19 ibid 424.

20 Andreas Coutsoudis and Max du Plessis, 'We Are All International Lawyers Now: the Constitution's International Law Trifecta Comes of Age' (2010) 136(3) SALJ 433–462.

21 ibid.

22 ibid 158.

23 Constitution of South Africa s 232.

24 Coutsoudis (n 2) 167. See also the reference thereunder.

25 ibid 167, 172. See also the reference thereunder.

international law as expressed in international agreements, the authors opine that the executive and parliament must ensure, as prescribed by the Constitution, that when they take steps to consensually 'bind South Africa to international obligations, they must not do so when this would be inconsistent with the Constitution'[26] and if they fail to act appropriately, that would be an unconstitutional exercise of public power.[27] And as clearly demonstrated by the Constitutional Court judgment, the courts would be ready to review any unlawful and/or irrational exercise of public power by South African public officials even at the international level. It is these linkages between constitutional law and international law that lead Coutsoudis and Du Plessis to view this relationship as a virtuous cycle 'where international law and constitutional law are interpreted so as to ensure unity and harmonization, not conflict.'[28]

At the end of their article, Coutsoudis and Du Plessis, like Tladi, criticise the Constitutional Court for failing to consider subsequent practice in its determination of whether the SADC Summit violated the SADC Treaty by using the consensus procedure when adopting the 2014 Tribunal Protocol.[29] We deal with this issue at length in our analysis of Tladi's article below.

Coutsoudis and Du Plessis also seem to suggest that contrary to the conclusion reached by the Constitutional Court, the three-quarters majority requirement in the SADC Treaty (which the SADC Summit avoided when adopting the 2014 Tribunal Protocol) is in fact less onerous than the route that was ultimately chosen by the SADC Summit—adopting the 2014 Tribunal Protocol by consensus and subjecting it to a two-thirds ratification by SADC Member States before coming into force.[30] We differ with Coutsoudis and Du Plessis on this. First and foremost, it should be noted that the three-quarters majority requirement (which, as demonstrated in detail below, is in fact more onerous than the consensus decision-making procedure) is unambiguously set out in the SADC Treaty as the procedure for taking decisions for the amendment of the SADC Treaty and the 2000 Tribunal Protocol. It is not for the Summit to whimsically cherry-pick a decision-making procedure, since the framework is clearly and unambiguously set out the SADC Treaty itself.[31]

Secondly, and probably more importantly, the practical implication of the actions of the SADC Summit appear to be lost on the two authors. By preferring, contrary to a clear and unambiguous SADC Treaty prescription, a less onerous consensus decision-making procedure, the SADC Summit had clearly opted for an easy way out;[32] and maybe even

26 ibid 168, 169.
27 ibid 168.
28 ibid 170.
29 ibid 190.
30 ibid 192.
31 See a detailed discussion of this issue in our discussion of Tladi's article below.
32 See a detailed discussion of the meaning of consensus below.

more tellingly, the SADC Summit used the opportunity not only to redesign the SADC Tribunal and to limit its jurisdiction, but to actually make sure that for some time, the SADC Summit would be free of judicial constraints at the regional level. As has been pointed out by some scholars, SADC had existed for thirteen years without a judicial body, owing to the delay in the adoption of the 2000 Tribunal Protocol.[33] There was also reluctance on the part of SADC Member States to ratify the 2000 Tribunal Protocol once adopted. There was a further delay in the actual setting up of the SADC Tribunal even after the Summit had decided to get rid of the ratification requirement.[34] So, by eschewing the three-quarters majority vote and opting for the consensus procedure, the SADC Summit easily got rid of the 'troublesome' 2000 Tribunal Protocol. Instead, they sought to bring in a weaker Tribunal where citizens of SADC Member States will no longer be able to bring cases (including human rights cases) against SADC Member States.[35] And there is no gainsaying that, just like in the past, it may take a while for the 2014 Tribunal Protocol to receive the necessary ratifications, if at all. And it would appear that the Constitutional Court was very much alive to the legal-political scheme of things. Not only had it dealt at length with a matter arising from the SADC Tribunal before[36] but the statement below portrays a court with a clear knowledge of the entire animal before it:

> That said, every issue that arose for determination is, or is traceable to, an offshoot of a masterplan that was devised by the Summit at the instance of the Republic of Zimbabwe. Clearly, Zimbabwe did not want to comply with the unfavourable decisions made against it by the Tribunal. It then crafted a strategy that would be fatal to the possibility of the Tribunal ever embarrassing it again.[37]

33 See for example, Phooko and Nyathi (n 2) 420.

34 Phooko and Nyathi (n 2) 419; Mkhululi Nyathi, *The Southern African Development Community and Law* (Palgrave Macmillan 2019) 72–73.

35 Phooko and Nyathi (n 2) 422; Nyathi (n 34) 88, 200–201; Laurie Nathan, 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 35(4) Human Rights Quarterly 880, 882, 886, 891–892; Mkhululi Nyathi, 'Supreme in Letter, Supreme in Spirit, Supreme in Deed: an Exposition of the SADC Summit's Overarching Powers in the SADC Integration Project' (2017) 31(2) Speculum Juris 176.

36 *Government of the Republic of Zimbabwe v Fick & Others* 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC).

37 Constitutional Court judgment para 44. In any case, the *amicus curiae* before the court, the Southern African Litigation Centre (SALC) specifically 'exposed' this scheming in their heads of arguments filed of record, and such could have hardly escaped the justices of the Constitutional Court. In paragraph 57 of their heads of argument SALC argue as follows: 'It stands to reason that the Article 22 procedure was used for the 2014 Protocol precisely because it requires fewer states to support the decision. […] It is more likely that Article 22 ratification – ostensibly the process to amend protocols – allows the SADC states to avoid reconstituting the Tribunal indefinitely. This is a further sign that the decision to participate in Article 22 process was taken in bad faith and is consistent with the repeated procedural and substantive actions taken by the President individually and collectively within the Summit to fetter the Tribunal.' The SALC heads of argument, together with the heads of arguments

Another contention by Coutsoudis and Du Plessis is that the Constitutional Court failed to consider the issue that the 2000 Tribunal Protocol came through the back door. Their argument is that the 2001 amendment of Article 16 of the SADC Treaty (which made the SADC Tribunal Protocol an integral part of the SADC Treaty) never received the approval of the South African parliament as required by section 231(2) of the Constitution of South Africa.[38] They appear to suggest that absent parliamentary approval of the relevant SADC Treaty amendment and of the 2000 Tribunal Protocol itself, perhaps the President should not have been faulted with acting in breach of same. This issue is, however, not as simple as the authors seem to suggest. While it may be argued that it would be imperative for amendments to the SADC Treaty to be brought before the South African parliament for approval,[39] there is also an equally compelling, if not stronger, argument to the contrary. It does not appear that section 231(2) of the South African Constitution prescribes parliamentary approval for each and every amendment of a treaty that has been approved by parliament. For example, it can be argued that the South African parliament, by approving the SADC Treaty, was aware (as it should have been aware anyway) of the Article 36 (of the SADC Treaty) amendment provision, which clearly eschews ratifications (or 'approvals', if one were to use the exact language employed by the Constitution of South Africa) of its amendments by the SADC Member States per their constitutional dictates. It may be stretching it too far to say that, in approving the SADC Treaty, which clearly limits its amendments to the SADC Summit, the South African parliament expected each and every amendment to the Treaty to be brought before it for approval. The South African parliament can therefore be said to have given the executive (specifically the President of South Africa) due deference when it comes to amendments to the SADC Treaty. Whether that was a wise decision on the part of the South African parliament is a matter for another day. It is therefore unfair for Coutsoudis and Du Plessis to criticise the Constitutional Court for 'glossing' over this and other 'significant international law principles and issues' which, in their view, 'warranted careful consideration.'[40] That is especially so as this was not one of the issues to be determined by the Constitutional Court. It should be appreciated that courts do not plead on behalf of litigants and that generally, they should not be in the forefront of identifying legal issues for the litigants, as their duty is to deal fairly with issues as formulated and presented by the parties to a dispute.[41] Therefore, what might be of interest to an academic mind *ex post* judgment

filed by the other parties <http://www.saflii.org/za/cases/ZACC/2018/51.html> accessed 25 January 2021.

38 Coutsoudis (n 2) 193.

39 Phooko and Nyathi (n 2) 430.

40 Coutsoudis (n 2) 194.

41 See the concurring judgment of Zondo AJ in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) 2012 (33), 2012 5 BCLR 449 (CC) paras 109, 112–114 and the case law authorities cited there. This is not to say that courts cannot seek further submissions from the parties. They can do so, especially if the submissions will likely assist the court in the proper determination of the matter

does not necessarily mean that it should have fallen for determination by a court of law seeking to pragmatically determine issues before it as set out in the pleadings filed of record. But having said that, we need to acknowledge and reiterate the point that there is a need to address (by means of SADC Treaty amendment) the oddity of having the SADC Treaty (the constitutive and primary legal instrument of SADC) amended by just three-quarters of the members of the Summit without any requirement for ratification by SADC Member States; yet protocols, which are subordinate legal instruments, generally require ratification before they enter into force.[42]

Other scholars who have analysed the Constitutional Court judgment are Phooko and Nyathi,[43] who analyse the Constitutional Court judgment within the broader legal-historical developments that led to the matter ending up in the Constitutional Court of South Africa.[44] By and large, Phooko and Nyathi agree with the reasoning and conclusion of the Constitutional Court, although they do point out some errors made by the Constitutional Court. One of these, is the Constitutional Court's failure to project the correct legal position regarding the amendment of the SADC Treaty. The Constitutional Court appears to wrongly suggest that three-quarters of the SADC Member States are required to amend the SADC Treaty. The authors point out that while there are provisions to ensure that there is some input from Member States in the process of the amendment of the SADC Treaty, the ultimate decision to amend the SADC Treaty rests solely with the SADC Summit as an institution of the SADC. The authors point out that this is an aberration as other regional economic communities such as the East African Community, the Economic Community of West African States and the European Union require ratification of their constitutive treaties by Member States.[45] However, in Phooko and Nyathi's view, this error is minor and inconsequential and does not in any way negatively impact the overall reasoning and conclusion of the Constitutional Court.[46]

Phooko and Nyathi also criticise the Constitutional Court for raising (flagging, in the words of the Constitutional Court) a moot point on what it deemed to be an unclear hierarchy between the SADC Tribunal and apex domestic courts of SADC Member States. According to Phooko and Nyathi, this was unnecessary as not only was this not an issue before the court, but also because the hierarchical relationship between the SADC Tribunal and the domestic apex courts of SADC Member States is clearly set out

before it. See for example *Jacobs & Others v S* (CCT 73/17) [2019] ZACC 4; 2019 (5) BCLR 562 (CC) para 24; *A M v H M* (CCT95/19) [2020] ZACC 9; 2020 (8) BCLR 903 (CC) para 17.

42 Nyathi (n 34) 5, 186–187.

43 Phooko and Nyathi (n 2).

44 ibid 418–422.

45 ibid 430. See also a similar argument in Nyathi (2017) (n 35) 168, 174. This article was written prior to the SADC Tribunal judgment under discussion.

46 Phooko and Nyathi (n 2) 430.

in the 2000 SADC Tribunal Protocol.[47] The authors also criticise the minority opinion, which in their view was unnecessary as in the final analysis, the minority logically agree with the majority.[48]

Another author who has analysed the Constitutional Court judgment is Sanya Samtani.[49] Samtani's article focuses on what she calls the Constitutional Court's finding that the President's conduct violated or threatened to violate the Bill of Rights, especially the right of access to justice.[50] Among other things, Samtani criticises the Constitutional Court for applying international law 'directly' without justifying such an approach.[51] In our view, Samtani's criticisms emanate from her failure to appreciate the fundamental basis of the Constitutional Court's judgment. We deal at length with this issue in our analysis of Tladi's article which has similar arguments and conclusions like the ones made and reached, respectively, by Samtani. But to be fair to Samtani, she, right from the outset, narrowed the scope of her analysis to 'particularly the ground that the President's conduct violated or threatened to violate the Bill of Rights.' Be that as it may, Samtani fails to outline what the other grounds are, thereby leaving a distinct impression that she, like other commentators, missed the *ratio decidendi* of the judgment. And this is particularly so, especially if one has to consider that having dealt fully with the question of access to justice, Samtani, at the very end of her article, notes that:

> [t]he rest of the judgment holds that international executive action is reviewable at the same standard as domestic executive action […] In effect, this means that any act of the executive, whether international or domestic, is also subject to legality reviews.[52]

As we point out in detail in our analysis of Tladi's critique of the Constitutional Court, this 'rest' of the judgment is in fact the core of the Constitutional Court judgment.

Another scholar, Bates, has provided a succinct summary of and commentary on the Constitutional Court judgment.[53] After summarising the arguments and the court's

47 Although not stated in Phooko and Nyathi's article, Article 15 (2) of the 2000 SADC Tribunal Protocol clearly requires the exhaustion of local remedies as one of the jurisdictional requirements for individuals, both natural and legal: 'No natural or legal person shall bring action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.' Clearly then, a litigant would have gone as far as the apex domestic court in the relevant SADC Member (in the case of South Africa, this would be the Constitutional Court) before approaching the Tribunal. Therefore, contrary to the suggestion by the Constitutional Court (see paras 10–11 and 57–60 of the judgment), there is no ambiguity at all in that provision, let alone 'conflict.'

48 Phooko and Nyathi (n 2) 432.

49 Samtani (n 2).

50 ibid 199.

51 ibid 200.

52 ibid 224 (footnotes omitted).

53 Bates (n 2).

decision on the preliminary point on admissibility,[54] Bates properly captures the basis of the judgment—that the President violated the principle of legality enshrined in South Africa's domestic law. This is so because of the President's failure to follow the amendment procedure set out in the SADC Treaty. Further, that his conduct was not in good faith and therefore violated the customary norm of *pacta sunt servanda* which has been codified in Article 26 of the Vienna Convention on the Law of Treaties. This norm is applicable in South Africa by dint of section 232 of the Constitution of South Africa. Bates also notes that the same reasoning (on the President's signing of the 2014 Tribunal Protocol) was applicable to the suspension of the Tribunal.[55]

Bates also properly captures the rationality basis of the decision (which the Constitutional Court clearly refers to as an additional basis)—that the processes the South African President got involved in, in his capacity as a member of the SADC Summit (the suspension of the SADC Tribunal and the signing of the 2014 Tribunal Protocol), were irrational since they resulted in negating the fundamental guarantees and provisions of the SADC Treaty and the South African Constitution; and that only a lawful (and more onerous) SADC Treaty amendment process could have satisfied the test of rationality. [56] In fact, in the actual words of the court, rationality was 'one more ground for the invalidation and setting aside of the President's participation in the decision to suspend the operations of the Tribunal and amend its jurisdiction.'[57]

Neels Swanepoel is another scholar who has analysed the Constitutional Court judgment,[58] and who basically agrees with the minority judgment that the President's conduct should have been reviewed solely within the confines of the South African Constitution, thereby avoiding the 'need to examine the tangled question of when and how an international treaty becomes domesticated in South Africa.'[59] This line of reasoning arises from a lack of appreciation of the logic in the majority judgment, which basically uses the South African constitutional standard to review the President's conduct.[60] What the majority did was simply to announce that the conduct of the national executive is reviewable on the grounds of unlawfulness and rationality and it matters not if the impugned conduct was in the domestic sphere or in the international arena. It would be an academic exercise therefore to have expected the majority to not engage with the provisions of the SADC Treaty in its assessment of the President's conduct. In any case, it was the President's conduct within SADC that came under review in the South African courts. So, any constitutional review of that conduct not tied to the SADC Treaty would not have been possible. The court had to assess the President's conduct

54 ibid 275–276.
55 ibid 276–277.
56 ibid 277. See also paras 66–71 of the Constitutional Court judgment.
57 Paragraph 71 of the Constitutional Court judgment.
58 Swanepoel (n 2).
59 ibid 171.
60 See Phooko and Nyathi (n 2) 431–432.

against the clear and unambiguous letter of a treaty formally approved by the South African parliament in accordance with the dictates of the South African Constitution. The issue of domestication of that Treaty, while probably deserving future judicial exploration and analysis, was certainly not worth the attention of and engagement by the Constitutional Court. It is indeed telling that the minority agreed with the order by the majority, word for word, including that his impugned conduct was 'unconstitutional, unlawful and irrational.'

Moses Phooko is another scholar who has analysed the Constitutional Court judgment and in one of his articles,[61] criticises the Constitutional Court for holding that there is no legal obligation on the executive to invite the public to participate in its decision-making before signing or disengaging from international treaties.[62] He argues that such reasoning goes against 'South Africa's democracy, which is both representative and participatory in nature and demands transparency, responsiveness and accountability at all levels.'[63] But to be fair to the Constitutional Court, it reasoned that desirable though it might be, there is no legal obligation on the part of the executive to facilitate public participation in treaty-making. The court did not go as far as saying there is no such obligation in the entire South African constitutional scheme. The import of the court's rather terse disposal of the issue of public participation seems to be that facilitation of public participation is an obligation that falls on the South African parliament when making its decisions on approval and/or domestication of treaties, but it is not a legal requirement for the executive when signing treaties.[64] Phooko's attack on the court notwithstanding, the author makes a recommendation for constitutional amendment to accommodate public participation in treaty-making prior to both signing and ratification,[65] which, in a way, is an admission that there is currently no provision for public participation before the signing of a treaty; and that therefore the court was not wrong in reasoning accordingly.

In another article,[66] Phooko mainly looks at the opportunities presented by the decision of the South African Constitutional Court in the Constitutional Court judgment; and a similar decision by the High Court of Tanzania in *Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania*.[67] By and large, the reasoning by the two courts are similar and they reached similar conclusions, although they differed in the ultimate dispositive orders they issued. Among other things, the Tanzanian High Court held that pending re-opening doors of the suspended SADC Tribunal, it had inherent powers to entertain all legal disputes

61 Phooko (2020) CILSA (n 2) 1–22.
62 ibid 13.
63 ibid 13. See also the reference thereunder.
64 See para 87 of the Constitutional Court judgment.
65 Phooko (2020) CILSA (n 2) 3, 18.
66 Phooko (2020) Spec Juris (n 2) 174–187.
67 Cause No 23 of 2014 (judgment was delivered on 4 June 2019 and is on file with the authors).

between natural and legal persons against the government of Tanzania in matters arising from the SADC Treaty.[68] According to Phooko, this is a 'progressive decision from a human rights [perspective] as the Tanzanian High Court essentially [opened] the door to Tanzanian citizens to bring cases arising from the SADC Treaty before it until such time that the SADC Tribunal becomes operational.'[69] With respect to the decision of the South African Constitutional Court, specifically the order directing the withdrawal of the President's signature from the 2014 Tribunal Protocol, Phooko is of the view that the Constitutional Court 'appears to have gone too far'; 'as [t]he principle of separation of powers seems to be compromised.' The author uses the term 'judicial overreach' to describe that particular order of the Constitutional Court.[70] In another article, [71] Phooko, in the main, attacks the recent decisions by the South African courts, including the one in the Constitutional Court judgment, that point to a jurisprudence that allows for enforcement of treaty provisions that have not been domesticated in South Africa.[72]

Tladi's Arguments

As has already been intimated, Tladi's criticism of the Constitutional Court is scathing. By his own admission, he 'makes no attempt at nuance.'[73] At the core of Tladi's criticism is the failure by the Constitutional Court to follow what he calls the 'methodology of international law'. In fact, the term 'methodology (of international law)' is mentioned fifteen times throughout the article. But there is nothing other than just a passing attempt at elucidation of this concept, which he vaguely defines as 'the manner in which the rules are identified and the manner in which the content of such rules are determined.'[74] For a concept that anchors his entire criticism, one would have expected a clear and detailed framework of analysis, but he offers none. In the following two sub-sections, we discuss in detail the two main errors of Tladi's critique.

Failure to Properly Construe the Basis of the Decision: Access to Justice versus Breach of the SADC Treaty

For the most part, Tladi's article is dedicated to the discussion of the subject of access to justice. He seeks to argue that access to justice as a normative value is not guaranteed under international law in general, let alone under the SADC Treaties.[75] However, contrary to Tladi's contention that the right of access to justice was the fundamental

68 See order no. 4 on 51 of the judgment. The wording of the order has been slightly paraphrased.
69 Phooko (2020) Spec Juris (n 2) 179.
70 ibid 181, 183, 185, 186.
71 Phooko (2021) (n 2) 168–182.
72 ibid 176–180.
73 Tladi (n 2) 152. The lack of attempt at nuance is clearly evident in the sub-title of the article—'International Law Continues to Befuddle.' In other words, the author is saying the application of international law continues to confuse the South African Constitutional Court.
74 ibid 130.
75 ibid 138–142.

issue in the Constitutional Court judgment,[76] it was not. What was fundamentally at issue was the blatant breach of the provisions of the SADC Treaty by the SADC Summit.[77] It so happened however, that this breach of the SADC Treaty led to the negation of SADC citizens' right of access to justice at the regional level. But while denial of access to justice was a direct consequence of a breach of the SADC Treaty, the former was not the ultimate basis of the Constitutional Court decision, but the latter. Tladi seems to have failed to grasp the distinction between breach and consequences of breach. In his own words, '[t]he judgment of the Court in the *SADC Tribunal* case presupposes that there is, under international law, a right to access to justice that has been breached by the impugned decisions.'[78] He goes on to state that '[t]he claim underpinning the Court's conclusion must therefore be that there is, under international law, a right of access to justice *in the form of international or regional court* (sic).'[79] However, contrary to Tladi's assertion, whenever the judgment makes reference to access to justice, it ties this principle to the South African domestic constitutional scheme, and not to the fact that the President had breached some international law norm of access to justice.

From the reasoning of the court, had the SADC Summit, in its quest to jettison individual access to the Tribunal, followed the letter of the SADC Treaty amendment provisions, the Constitutional Court would not have had an issue with the South African President's participation in those SADC processes and decisions.[80] In fact, access to justice was not the only principle that was pointed out by the court as having been negatively impacted by the President's conduct, but human rights and the rule of law as well.[81] If anything, if the judgment of the Constitutional Court is considered in its entirety, putting aside lack of finesse, one can clearly discern that the question of access to justice, incidental as it was to the President's unlawful conduct, was clearly tied to the question of rationality, as the negation of this principle was clearly inimical to the South African constitutional scheme. In the final analysis, the Constitutional Court, in assessing the conduct of the President of South Africa *vis à vis* the provisions of the SADC Treaty, did no more than was required of it: It simply assessed his conduct against the ordinary meaning of the provisions of the SADC Treaty. It needs pointing

76 ibid 135.

77 Constitutional Court judgment para 100.

78 Tladi (n 2) 138.

79 ibid.

80 See in particular para 48 of the SADC Tribunal judgment. Had the SADC Summit followed the letter of the SADC Treaty, it would appear however, that the issue would have eventually turned solely on whether the amended SADC Treaty (and the South African President's participation in the amendment process) could be said to be consistent with the South African Constitution, especially the Bill of Rights which include the right of access to justice. That seems to be the import of para 79, among similar others, of the Constitutional Court judgment, not that the court categorically set out the principle that there is the right to access to justice at the international level. For similar reasoning, see Bates (n 2) 279.

81 Constitutional Court judgment paras 53, 67 and 69.

out that even Tladi agrees that this is the general rule of treaty interpretation contained in Article 31 of the 1969 Vienna Convention on the Law of Treaties,[82] which is generally accepted as customary international law.

Ultimately, and as we have already pointed out, the key jurisprudence arising out of the Constitutional Court judgment is that South African public officials, including the President, cannot do as they please in the international relations sphere. They are expected, in the context of international treaties that South Africa has ratified, to act as lawfully and rationally as they would in the South African domestic sphere, especially (but not necessarily), where their conduct has an effect on rights protected by the South African Constitution.

In our view, access to justice as a principle is, for lack of a better term, a spin-off from the court's key jurisprudence outlined above and was dealt with for the purposes of clarifying the scope of the section 231(1) power conferred on the President (the national executive to be precise) to negotiate and sign all international agreements.[83] In setting out the contours of the executive's powers in the negotiation and signing of international agreements, the court determined that the President is not at large to ignore the South African constitutional dream; and that he may not approve anything that undermines the South African Constitution's Bill of Rights and South Africa's international law obligations. The court therefore concluded that by curtailing access to justice (a norm protected by the Bill of Rights) in violation of the SADC Treaty (undermining South Africa's international law obligations), the President's signing of the 2014 Tribunal Protocol was unconstitutional.[84]

Unsurprisingly, Tladi also attacks the Constitutional Court's failure to make reference to cases that had previously dealt with the question of denial of access to the SADC Tribunal—for example the *Luke Tembani* case before the African Commission of Human and Peoples' Rights[85] and the *Swissbourgh Diamond Mines* case.[86] With respect, that attack is without foundation, since these cases dealt with the question of state(s)' denial of the right of access to justice/courts as the main issue for determination. On the other hand, the South African Constitutional Court was concerned with the South

82 Tladi (n 2) 141. Article 31 provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

83 See also Bates (n 2) 277.

84 ibid 277. See also paras 77, 79–85 of the Constitutional Court judgment.

85 *Luke Munyandu Tembani & Benjamin John Freeth (represented by Norman Tjombe) v Angola & Thirteen Others Communication* 409/12, 2013.

86 *Swissbourgh Diamond Mines & Others v The Kingdom of Lesotho,* Permanent Court of Arbitration Case No 2013–29, Partial Final Award on Merits and Jurisdiction, 18 April 2016; *Swissbourgh Diamond Mines & Others v The Kingdom of Lesotho,* Judgment of the Court of Appeal of Singapore of 27 November 2018.

African's President's breach of clear provisions of the SADC Treaty which, as we have already indicated, incidentally negated some of the rights protected by the South African Constitution, including the right of access to justice. In any case, especially with regards to the *Luke Tembani* case, the primary source of law upon which the pleadings were based was the African Charter on Human and Peoples' Rights (the African Charter), while the primary source of law in the matter before the South African Constitutional Court was the South African Constitution. In other words, the respondents in the *Luke Tembani* case, namely the SADC Member States and also State Parties to the African Charter, were being sued for their alleged breach of the African Charter; while in the South African Constitutional Court, the South African President was being sued for his violation of the South African Constitution, albeit for his foreign relations-related conduct. This, in fact, should put to rest the debate on whether the South African President's decision can be attributed to South Africa.[87] The doctrine of attribution and the principle of state responsibility simply do not arise.

Ironically though, despite devoting the greater part of his article to arguing that the Constitutional Court was wrong in basing its decision on the idea that the right of access to justice was violated,[88] Tladi quickly changes tack and accepts that 'the court seemed to rely on a rather technical argument concerning [SADC Treaty] amendment procedures.'[89] The reality, however, is that the court did indeed base its decision on the breach of SADC Treaty provisions on amendment. This, in fact, was the substantive issue before the Constitutional Court. It cannot be relegated to the status of 'technical argument' as suggested by Tladi.

SADC Summit Decision-making: Consensus versus Three-quarters Majority

We have noted that Tladi makes several errors on the subject of SADC Summit decision-making framework. We find it unnecessary to dwell on all of them. In a nutshell, Tladi's argument is that despite the fact that the SADC Treaty prescribes that three-quarters of the members of the SADC Summit are needed to effect SADC Treaty amendment, it does not matter that the SADC Summit did not follow this procedure. Further, according to him, this non-compliance with a mandatory procedure does not amount to a violation of the SADC Treaty, as the consensus decision-making procedure that the SADC Summit used when it abolished the SADC Tribunal is actually more onerous than the three-quarters majority threshold. In fact, Tladi appears to equate the consensus decision-making process to unanimity.[90] This conclusion is, as shall be seen below, erroneous.

87 See Tladi (n 2) 134, 137, 148–149 where he discusses this at length. This is the same error that the minority concurring opinion fell into. See paras 98–105 of the Constitutional Court judgment.

88 The term 'access to justice' is used seventeen times in Tladi's article.

89 Tladi (n 2) 142.

90 ibid 144.

To put Tladi's arguments in their proper context, we offer a broader analysis of the legal framework of SADC Summit decision-making processes below. The SADC Treaty sets out three ways in which the Summit can take its decisions—consensus, unanimity and by a qualified majority. Each of these is dependent on the nature of the decision being taken. As a general rule, decisions of the SADC Summit are taken by consensus;[91] and the different thresholds of support for exceptional decisions like Treaty amendment and admission of new members are specifically provided for.

But what exactly is taking a decision by consensus? Consensus implies not an overwhelming agreement or unanimity as mistakenly suggested by Tladi and others.[92] Neither does consensus give veto power enabling a SADC Summit member to block a decision they do not agree with as suggested by others like Osode.[93] Also, consensus does not rank higher than a qualified voting threshold, such as a three-quarters majority, as suggested by Tladi.[94] Consensus implies that none of those participating in taking the decision are 'seriously opposed to the taking of the decision'[95] but rather that they can easily be persuaded to agree to the decision, for example (but not necessarily) through package deals and giving in to some of their demands.[96]

As indicated above, decisions such as admission of new members into the SADC and the SADC Treaty amendment are taken outside the consensus framework. The SADC Treaty requires unanimity whenever a new member has to be admitted into SADC.[97] Needless to emphasise, this is a more onerous requirement than consensus. With regard to Treaty amendment, a three-quarters majority is prescribed.[98] Again, the three-quarters qualified vote is more onerous than the consensus framework, but is less onerous than the unanimity requirement. It would appear that the weightier the issue, the higher the threshold of support needed for that particular decision.

The different ways in which the SADC Summit should take its decisions is therefore clear and straightforward. The letter of the SADC Treaty—the primary source of law for judicial interpretative purposes—is unambiguous. To argue that the South African Constitutional Court should have had regard to the subsequent practice of the SADC

91 Article 10 (9) of the SADC Treaty.

92 See for example Patrick Osode, 'The Southern African Development Community in Legal Historical Perspective' (2003) 28 (3) Journal for Juridical Science 7, and the reference thereunder.

93 ibid.

94 Tladi (n 2) 144.

95 Nyathi (n 34) 44.

96 See Jan Klabbers, *An Introduction to Institutional Law* (2nd edn, Cambridge University Press 2009) 207–209, for a detailed discussion of consensus decision-making.

97 SADC Treaty Art 8 (4).

98 SADC Treaty Art 36 (1). SADC Treaty Art 35 on the dissolution of SADC institutions, which technically amounts to treaty amendment anyway, also requires a three-quarters majority.

Summit (a practice that Tladi alleges but fails to prove)[99] is, with respect, wrong for several reasons. First, where the language of an international legal instrument such as the SADC Treaty is clear and unambiguous, the expectation would be that the rule set out in the text should be followed,[100] as acting contrary to such a clear and unambiguous Treaty rule would be unlawful. No amount of subsequent unlawful practice would give legitimacy to the breach.

Second, the doctrine of subsequent practice is but one of the interpretive tools used by courts to arrive at the meaning of a treaty provision.[101] The doctrine of subsequent practice is especially useful where a treaty provision may admit of different interpretations, or is not detailed enough to cater for some scenarios; and a court called upon to interpret the relevant treaty provision may then have regard to the manner in which a relevant organ of an international organisation has consistently interpreted the rule in question.[102] Ironically, Tladi seems to appreciate this at some point, where he notes that the International Law Commission has noted that subsequent practice 'may serve to clarify the meaning of a treaty by narrowing, widening or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.'[103]

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99 Tladi (n 2) 146. Subsequent practice under international law means 'consistent, treaty-related actions and omissions of the parties to or organs established by the treaty on international level, which reflectthe common ideas of all the parties about the interpretation of the treaty.' See Christopher Peters, 'Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?' 3 (2011) (2) Göttingen Journal of International Law 619.

100 Article 31 of the Vienna Convention on the Law of Treaties (1969) provides as follows: '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: a. Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; b. Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3.There shall be taken into account, together with the context:
a. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; c. Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.'

101 ibid.

102 Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970), International Court of Justice (ICJ) 21 June 1971. See generally paras 19–41 of the Advisory Opinion dealing with South Africa's objections against the Court's dealing with the question, particularly the issue of abstention where the court held that voluntary abstention of a permanent member has consistently been interpreted as not constituting a bar to the adoption of resolutions by the Security Council.

103 Tladi (n 2) 145, making reference to the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice Draft Conclusion 7.

The doctrine of subsequent practice is therefore not a license for deliberate, let alone consistent breach of a clear and unambiguous provision of a treaty. It is instead tied to the search of meaning of a provision of a treaty. Also, subsequent practice is not a stand-alone tool of interpretation—it is one of the pointers to the meaning of a treaty provision to be taken into account together with the context.[104] As eloquently put by Klabbers in his discussion of the role of an international court (this can be logically extended to include any judicial organ seized with the interpretation of an international legal instrument), there is '[a] general interest that the rule of law is upheld, which then translates into an interest in organisations acting strictly in conformity with their constituent documents.'[105] Klabbers goes on to state:

> [t]he very legitimacy of the organization and its organs is often judged at least partly by the extent to which the organization can be seen to be working in accordance with established procedures and within the parameters of its constitutional documents.[106]

In light of the foregoing, the case of *Calist Andrew Mwatela & 2 Others v East African Community*,[107] in the East African Court of Justice, is very instructive, for it demonstrates the need of fidelity to clear and unambiguous terms of a treaty. The most relevant facts were that the applicants were challenging the validity of a certain meeting of the Sectoral Council on Legal and Judicial Affairs (the Sectoral Council) and the decision taken at that meeting; and were seeking an order declaring all decisions, directives and actions based on that meeting null and void.[108] The two bases of the applicants' challenge were that the Sectoral Council was not established in accordance with the East African Community Treaty (EAC Treaty) and that the impugned meeting of the Sectoral Council was not a properly constituted meeting of the Sectoral Council.[109]

The applicants contended that since the EAC Treaty was clear on the composition of the EAC Council (Council), whose members consisted of ministers responsible for regional cooperation in each EAC Partner State and such other ministers of Partner States as each Partner State may determine; and that the EAC Treaty empowered the Council to establish, *from among its members*, Sectoral Councils to deal with matters that Council may delegate or assign to them; the earlier Council decision (taken in 2001) to constitute meetings of the Attorneys-General of Partner States into the Sectoral Council on Legal and Judicial Affairs was *ultra vires* the EAC Treaty because that body

104 Vienna Convention Art 31(3)(b) (n 83). The other two are any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions [art 31(3)(a)]; and any relevant rules of international law applicable in the relations between the parties [art 31(3)(b)].

105 Klabbers (n 96) 206.

106 ibid.

107 Reference 1 of 2005, Application 1 (EACJ, Oct 1, 2006).

108 ibid 2.

109 ibid 8.

was not composed of *members of the Council*.[110] The applicants advanced two principles of treaty interpretation—the words of a treaty must be given their natural meaning unless that would lead to some unreasonable or absurd result; and the principle of effectiveness whereby a court must ascertain the objective of a treaty and give effect to it.[111] With regard to the principle of effectiveness, the applicants submitted that the objective of the EAC Treaty in creating the Council was to 'create a strong policy making organ of the Community composed of persons with authority from the Partner States to make binding decisions [and that] [t]he Treaty does not leave room for bureaucrats taking over decision-making at that level.'[112]

In response, the EAC, through the Counsel to the Community, while acknowledging that the provisions of the EAC Treaty must be strictly adhered to, submitted that the EAC 'functions on the basis of consensus as its survival depends on goodwill of the Partner States and harmonious working relationship with the organs and institutions and on their agreeing on all aspects of the Community's development' and 'urged the Court to have these matters in mind in answering the issues before it.'[113]

The East African Court of Justice ruled that the establishment of the Sectoral Council was inconsistent with the provision of the EAC Treaty as not all its members were ministers.[114] The court, however, further held that:

> [S]ince the purported Sectoral Council has been in place since 2001 and by now has, undoubtedly made a number of decisions, which would be unwise to disturb, we are of the considered opinion that this is a proper case to apply the doctrine of prospective annulment.[115]

It therefore decided that its 'decision to annul the Sectoral Council shall not have retrospective effect.'[116]

Third, and assuming merely for the sake of argument that the SADC Summit's subsequent practice was relevant in the determination of whether the Summit acted unlawfully in its adoption of the 2014 Tribunal Protocol, there is nothing to show and prove what that subsequent practice was and whether it had been consistently followed

110 ibid 8–9. It turned out that the Attorneys-General of Kenya and Uganda are 'ministers' per the two countries' domestic legal framework; but the Attorney-General of Tanzania is not a minister. See 12–13 of the judgment.
111 ibid 9.
112 ibid.
113 ibid 10.
114 ibid 13.
115 ibid.
116 ibid.

by the SADC Summit over time.[117] But it does not even appear that there was any contestation around the issue of SADC Summit decision-making. No party before the Constitutional Court seemed to contest that SADC Treaty amendment requires three-quarters of the SADC Summit. Tladi, again with respect, is therefore wrong in inventing an issue that did not arise as such before the Constitutional Court and then accusing the Constitutional Court of failing to deal with a non-issue. As we have already stated, courts of law deal with issues as formulated by the parties before them.[118]

In any event, and for purposes of completeness, it should be pointed out that contrary to the argument advanced by Tladi that the SADC Summit's subsequent practice with regard to SADC Treaty amendment, pointed to the preference for consensus decision-making procedure, as opposed to the three-quarters majority—the reality is, however, that the opposite is true. In fact, from 2001 up to 2009, all the amendments to the SADC Treaty were by three-quarters majority of the members of the SADC Summit in line with Article 36 of the SADC Treaty; and the SADC Summit had also amended the 2000 Tribunal Protocol using Article 37 of that Protocol which had earlier been amended to be in line with Article 36 of the SADC Treaty.[119] Tladi is therefore also wrong to suggest that the SADC Treaty amendment provisions conflict with the amendment proceedings carried in the 2000 Tribunal Protocol.[120] First and foremost, the 2000 Tribunal Protocol occupies a pride of place in the SADC legal framework. Unlike other protocols which are second-tier legal instruments, the 2000 Tribunal Protocol is an integral part of the SADC Treaty.[121] The 2000 Tribunal Protocol was made the only Protocol that is an integral party of the SADC Treaty by the 2001 amendment to the SADC Treaty.[122] In any event; and because of the need for clarity, the 2000 Tribunal Protocol was itself subsequently amended on 3 October 2002 in Luanda, Angola, to bring its amendment procedure into line with the SADC Treaty.[123] The many convoluted references to two-

117 Coutsoudis and Du Plessis (n 2) make a casual suggestion that 'the procedure adopted was in fact agreed to some two years prior to the adoption of the 2014 protocol […] when the Summit had, in 2012, made a decision to adopt a new protocol to limit the jurisdiction of the Tribunal.' This reference to a single instance is certainly not enough to point to 'practice.' And neither can the nature of the 2012 Summit decision (expression of intent) be viewed as similar to an actual legal act of adopting a new legal instrument.

118 See also *Shorai Mavis Nzara & Others v Cecilia Kashumba NO & Others* SC (Zimbabwe) Judgment No. SC18/18 at 8–15 (judgment on file with the authors).

119 See Amicus (Southern African Litigation Centre) Heads of Argument in the SADC Tribunal case, para 31 <http://www.saflii.org/za/cases/ZACC/2018/51.html> accessed 25 January 2021. All these amendments are available at <https://www.sadc.int/documents-publications/show/7813> accessed 25 January 2021.

120 Tladi (n 2) 142–143.

121 SADC Treaty Art 16(2).

122 Nyathi (n 34) 72. It should be noted that before this amendment, the SADC Treaty provided that all Protocols were an integral part of the Treaty. This was a legal oddity in that generally, Protocols could only bind State Parties to it, not the generality of the SADC Member States.

123 Agreement Amending the Tribunal Protocol Art 18; Nyathi (n 34) 73.

thirds and three-quarters majorities (in reference to the SADC Summit) in Tladi's argument clearly portrays a lack of appreciation of the actual legal position as outlined here.[124]

Conclusion

The discussion in this article reveals that the continued unlawful suspension of the SADC Tribunal remains topical to many legal scholars. The academic writings of the different scholars, especially on the judgment of the Constitutional Court of South Africa in *Law Society of South Africa & Others v President of the Republic of South Africa & Others*, are appreciated as they provide divergent views on that judgment. Indeed, robust and rigorous scholarship can only lead to development of jurisprudence. However, since the resolution of the SADC Tribunal impasse will most likely lie in the political arena, it is incumbent upon legal scholars to present objective analyses. The danger of academic analyses that unnecessarily disparage court judgments such as the one that is the focus of this article, let alone scholarship that baselessly questions the general capacity of the South African Constitutional Court to deal with matters that implicate international law, may unfortunately serve to legitimise what was clearly an unlawful decision taken in bad faith. SADC political leaders are likely to identify with such analyses which appear to sanitise their otherwise unlawful actions, and would therefore be content with the current status quo. Courts, including apex courts, do err, but legal scholars need to maintain fidelity to fairness and legal principles in their analyses of court judgments, especially when the matter at issue is still far from being resolved. The motivation for this article was to point out the errors in the analyses by some of the scholars mentioned in this article and especially Tladi, the title of whose article announces to all, without objective backing, that the South African Constitutional Court has always been and continues to be confused by international law.

124 Tladi (n 2) 144–145.

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