

# **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND ANOTHER V TEMBANI AND OTHERS CCT162/22**

Case CCT 162/22  
[2024] ZACC 05

Hearing Date: 07 November 2023

Judgement Date: 06 May 2024

## **Post Judgment Media Summary**

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Monday, 6 May 2024 at 09h00, the Constitutional Court handed down judgment in an application for leave to appeal a judgment and order of the Supreme Court of Appeal, (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria) dated 20 May 2022.

Following an amendment to the Zimbabwean Constitution in 2005, agricultural land became liable to be confiscated without compensation and the jurisdiction of the Zimbabwean courts to entertain challenges to such confiscations was ousted. The 25 respondents in this matter owned farms or conducted farming operations in Zimbabwe and claimed to have suffered financial losses pursuant to confiscations of their land. Because of the ousting of the jurisdiction of the Zimbabwean courts, some of the respondents pursued claims for damages in the Southern African Development Community (SADC) Tribunal.

Five of the respondents' claims were adjudicated by the Tribunal which held that fair compensation was payable to them for land acquired by Zimbabwe. Zimbabwe did not comply with the Tribunal's decision. Consequently, two of the respondents approached the Tribunal for further relief. The Tribunal ruled that Zimbabwe had failed to comply with its earlier decision. Zimbabwe continued to act in defiance of the Tribunal's decisions and asserted that the SADC Protocol adopted in 2000, which established the Tribunal, was not binding on it because it had not ratified the Protocol.

Some of the respondents applied to the High Court in South Africa to have the Tribunal's decisions recognised and enforced in terms of Article 32 of the 2000 Protocol. The High Court granted an order in their favour. As a result, Zimbabwe applied for the rescission of the High Court's orders. The rescission application was dismissed by the High Court and subsequent appeals to the Supreme Court of Appeal and this Court suffered the same fate. In the meanwhile, the Summit, being SADC's supreme policy-making institution comprising the Heads of State or Governments of member states, took a decision in May 2011 to suspend the operations of the Tribunal. Although not present at this Summit meeting, South Africa's Head of State at the time, President Zuma, supported the decision through representation.

On 18 August 2014, the SADC Summit resolved to adopt a new protocol in place of the 2000 Protocol. President Zuma was present at this Summit meeting, supported the resolution and signed the 2014 Protocol. In terms of Article 33 of the 2014 Protocol, the Tribunal's jurisdiction was confined to disputes between member states. In other words, the right of individuals to bring disputes before the Tribunal was abolished. In March 2015, the Law Society of South Africa (LSSA) launched an application in the High Court challenging the lawfulness of President Zuma's participation in the adoption and signing of the 2014 Protocol.

On 21 July 2015, five of the present respondents brought an intervention application to join as applicants in the LSSA's application, which application was granted. On 1 March 2018, the High Court declared President Zuma's participation in suspending the operations of the Tribunal in 2011 and his subsequent signing of the 2014 Protocol unlawful, irrational and unconstitutional. In terms of section 172(2)(a) of the Constitution, the High Court referred its order to this Court for confirmation. On 11 December 2018, this Court confirmed the order of unconstitutionality and directed the President to withdraw his signature from the 2014 Protocol. President Ramaphosa subsequently withdrew the signature.

On 14 December 2018, the respondents delivered a notice in terms of section 3(1) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (Institution Act), giving notice that they intended to institute a damages action against the President and Government, the applicants in this matter. The President contended that the notice had not been delivered within the six month time period prescribed by the Institution Act. On 9 April 2019, the respondents served their summons, together with a condonation application for their failure, to the extent necessary, to comply timeously with the six month time bar prescribed by the Institution Act. The respondents contended that they did not need condonation because the debts only became due when this Court delivered judgment on 11 December 2018.

The applicants disputed that this Court's confirmation judgment was an element of the respondents' causes of action. They contended that the debts which the plaintiffs were seeking to enforce became due on 18 August 2014 (when President Zuma signed the 2014 Protocol) or by the latest on 21 July 2015 (when the respondents intervened in the LSSA's application, thereby demonstrating knowledge of the relevant facts). The applicants also contended that the particulars of claim were vague and embarrassing, which led to several amendments by the respondents.

When no further amendments were forthcoming, the applicants raised five exceptions, only two of which formed the subject of this appeal. Those two exceptions were the causation exception (the applicants contended that the respondents failed to allege facts disclosing that the applicants caused the alleged financial losses) and the legal duty exception (that the respondents failed to plead facts disclosing that President Zuma's conduct was delictually wrongful).

The High Court agreed with the respondents that this Court's confirmation judgment completed their causes of action, that their claims were thus not prescribed in terms of the Prescription Act 68 of 1969 and that therefore condonation was not needed. It thus made no order as to condonation, save for costs. Regarding the causation exception, the High Court considered both factual and legal causation and upheld both. On factual causation, the Court reasoned that there were insufficient facts pleaded to demonstrate a proximate cause between President Zuma's conduct and the alleged damages. On

legal causation, the Court reasoned that South Africa should not be held liable to compensate non-nationals where the Government breached international law. Regarding the legal duty exception, the Court rejected this exception and held that on the pleaded case President Zuma had not acted in good faith and his conduct fell short of the scope of section 231(1) of the Constitution. The High Court granted the parties leave to appeal and cross-appeal to the Supreme Court of Appeal.

The Supreme Court of Appeal considered the causation exception and found that the High Court had erred in dealing with both factual and legal causation. In the Supreme Court of Appeal's view, that exception was confined to factual causation only and that on factual causation, the High Court's reasoning could not be supported. Regarding the legal duty exception, the Court held that the dismissal of an exception is not appealable. On condonation, the Court held that since the High Court had made no order on the condonation application, there was no order against which the applicants could appeal. The Supreme Court of Appeal thus upheld the respondents' appeal against the upholding of the causation exception and struck the applicants' cross-appeal from the roll. Aggrieved by this, the applicants approached this Court seeking that it uphold both exceptions and that it find that the respondents' claims had prescribed.

In the unanimous judgment authored by Rogers J (Zondo CJ, Dodson AJ, Kollapen J, Mathopo J, Mhlantla J, Schippers AJ and Tshiqi J concurring), the Constitutional Court held that its jurisdiction was engaged in terms of sections 167(3)(b)(i) and (ii) of the Constitution because the question whether this Court's confirmation judgment was necessary to complete the respondents' causes of action raised a constitutional matter and an arguable point of law of general public importance. In addition, the question whether confirmation proceedings can interrupt prescription in respect of a delictual action is an arguable point of law of general public importance and a constitutional matter that impacts section 34 of the Constitution. The legal duty and causation exceptions also have a constitutional dimension because whether the conduct of the President should be treated as wrongful for delictual purposes involves questions of legal and public policy, particularly so where alleged violations of the Constitution form part of the case for delictual wrongfulness. The Court granted leave to appeal on the basis that the applicants enjoyed prospects of success and it was desirable to dispose of the case to prevent significant burdens in time and costs on the litigants.

On the merits of the case, the Court held that if a creditor requires condonation in terms of a section 3(1) notice, and the debtor raises prescription as an objection to condonation, a court must determine prescription as part of the condonation application. On condonation, the Court held that the Supreme Court of Appeal's approach in finding that there was nothing against which the applicants could appeal was too formalistic. By making no formal order on the condonation application, the High Court in substance made a decision adverse to the applicants and this decision was appealable. Moreover, the High Court took its decision on the condonation application into account when determining the overall costs order. The applicants' cross-appeal in respect of the High Court's decision on the condonation application had thus properly been before the Supreme Court of Appeal.

On prescription, the Court found that the respondents' contention that the President's conduct had to be treated as constitutional until this Court delivered its confirmation judgment, is untenable. In this regard, the doctrine of objective constitutional invalidity demonstrates that the President Zuma's alleged conduct did not become unconstitutional only from the time that this Court made such a finding. There was a

complete cause of action without there having been an order of confirmation by this Court. The debts thus fell due by not later than 18 August 2014 and the respondents had the requisite knowledge of the debt by not later than 21 July 2015. As a result, the debts were prescribed and the High Court should have dismissed the respondents' condonation application. It follows, the Court held, that it is unnecessary to consider the exceptions because the exceptions presume that an action was permissibly instituted.

For these reasons, the Constitutional Court upheld the appeal and set aside the orders of the High Court and Supreme Court of Appeal. It replaced those orders with one dismissing the respondents' application for condonation and the respondents' action. The Court ordered the parties to pay their own costs in the High Court, Supreme Court of Appeal and this Court.