CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 162/22

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Applicant
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Second Applicant

And

LUKE M TEMBANI	First Respondent
LMT ESTATES (PVT) LIMITED	Second Respondent
WYNAND HART	Third Respondent
QUEENSDALE ENTERPRISES (PVT) LIMITED	Fourth Respondent
MADODA ENTERPRISES (PVT) LIMITED	Fifth Respondent
KLIPDRIFT ENTERPRISES (PVT) LIMITED	Sixth Respondent
MIKE CAMPBELL (PVT) LIMITED	Seventh Respondent
RICHARD THOMAS ETHERIDGE	Eighth Respondent
ANDREW KOCKOTT	Ninth Respondent
TENGWE ESTATES (PVT) LIMITED	Tenth Respondent
CHRISTOPHER MELLISH JARRETT	Eleventh Respondent
STUNULA RANCHING (PVT) LIMITED	Twelfth Respondent
LACHABI RANCH (PVT) LIMITED	Thirteenth Respondent

LARRY CUMMING	Fourteenth Respondent
FRANCE FARM (PVT) LIMITED	Fifteenth Respondent
MICHAEL IAN PATRICK ODENDAAL	Sixteenth Respondent
DEBORAH LOUISE ODENDAAL	Seventeenth Respondent
GRASSFLATS FARM (PVT) LIMITED	Eighteenth Respondent
MURIK MARKETING (PVT) LIMITED	Nineteenth Respondent
GIDEON STEPHANUS THERON	Twentieth Respondent
EBEN HAESER (PVT) LIMITED	Twenty-First Respondent
EDEN FARM (PVT) LIMITED	Twenty-Second Respondent
PETER HENNING	Twenty-Third Respondent
CHIREDZI RANCHING (PVT) LIMITED	Twenty-Fourth Respondent
BATALEURS PEAK FARM HOLDINGS (PVT) LIMITED	Twenty-Fifth Respondent

Neutral citation: *President of the Republic of South Africa and Another v Tembani and Others* [2024] ZACC 5

Coram: Zondo CJ, Dodson AJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Schippers AJ and Tshiqi J

Judgment: Rogers J (unanimous)

Heard on: 7 November 2023

Decided on: 6 May 2024

Summary: Prescription — delictual claims for damages — unconstitutionality of President's conduct a component of alleged wrongfulness — whether completion of cause of action delayed until Constitutional Court makes order confirming or declaring unconstitutionality of President's conduct

Prescription — whether institution of review application by third party in respect of President's unconstitutional conduct interrupted prescription in respect of plaintiffs' damages claims — whether intervention by certain plaintiffs in the review interrupted prescription in respect of the damages claims

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal succeeds.
3. The orders of the High Court and Supreme Court of Appeal are set aside.
4. The High Court's order is replaced with the following order:

   "(a) The plaintiffs' application for condonation is dismissed.

   (b) Consequently, the plaintiffs' action is dismissed."
5. The parties shall bear their own costs in the High Court, the Supreme Court of Appeal and this Court.

JUDGMENT

ROGERS J (Zondo CJ, Dodson AJ, Kollapen J, Mathopo J, Mhlantla J, Schippers AJ and Tshiqi J concurring):

Introduction

[1] This matter has its genesis in Zimbabwe's controversial land redistribution programme. Land owned or farmed by the respondents was taken without

compensation under that programme. A constitutional amendment in Zimbabwe prevented them from seeking legal redress there. For reasons which will become apparent, they now look to the applicants, the President of the Republic of South Africa and the Government of the Republic of South Africa, for recompense. They do so in a damages action pending in the High Court of South Africa, Gauteng Division, Pretoria (High Court). The respondents, 25 in all, are the plaintiffs in that action. For convenience, I shall refer to the parties as they are in the action.

[2] Together with their action, which they instituted in April 2019, the plaintiffs served an application to condone, to the extent necessary, their failure timeously to serve the notice required by section 3(1) of the Institution of Legal Proceedings against Certain Organs of State Act[1] (Institution Act). After several amendments were made to the particulars of claim, the defendants delivered an exception to the amended particulars of claim. These exceptions are summarised later in this judgment.

[3] The condonation application and exception were argued together. The High Court upheld the exception in part.[2] It made no order on the condonation application. With leave granted by the High Court, the plaintiffs appealed and the defendants cross-appealed to the Supreme Court of Appeal. That Court upheld the plaintiffs' appeal and struck the defendants' cross-appeal from the roll.

[4] The defendants now seek leave to appeal to this Court. They contend that the High Court and Supreme Court of Appeal should have refused the condonation application because the debts which the plaintiffs were seeking to enforce had prescribed. They also contend that the High Court and Supreme Court of Appeal should have upheld the grounds of exception which asserted that the amended particulars of claim lacked averments to show that (a) the defendants owed the plaintiffs a legal duty

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[1] 40 of 2002. The relevant parts of section 3 of this Act are quoted at [68] below.

[2] *Tembani v President of the Republic of South Africa*, unreported judgment of the North Gauteng High Court, Pretoria, Case No 24552/2019 (18 December 2020).

to prevent the damages they allegedly suffered or (b) the defendants' conduct was the factual or legal cause of the damages.

Factual background

[5] The 25 plaintiffs owned farms or conducted farming operations in Zimbabwe. Ten of the plaintiffs are private individuals, four of whom are Zimbabwean citizens, the other six being South African citizens who held interests in farming operations in Zimbabwe. The remaining 15 plaintiffs are Zimbabwean companies.

[6] In terms of section 16B of Zimbabwe's Constitution, inserted with effect from 16 September 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.[3] The plaintiffs claim to have suffered financial losses as a result of confiscations under that provision. The 10 plaintiffs who are private individuals also consider themselves entitled to damages for pain and suffering because of the way they were treated during the confiscations. Such treatment allegedly included assaults and violent evictions.

[7] Because of the ousting of the jurisdiction of the Zimbabwean courts, some of the plaintiffs pursued claims against Zimbabwe in the Southern African Development Community (SADC) Tribunal (Tribunal). SADC was established by treaty in August 1992[4] (SADC Treaty). Zimbabwe was a founding member state. The Treaty entered into force on 30 September 1993. South Africa acceded to the SADC Treaty in August 1994.[5]

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[3] Section 16B was inserted into Zimbabwe's Constitution by section 2 of the Constitution of Zimbabwe Amendment (No 17) Act, 2005.

[4] SADC Treaty, 17 August 1992.

[5] Instrument of Accession, 29 August 1994.

[8] Article 4 of the Treaty requires SADC and member states to act in accordance with various principles, among them "human rights, democracy and the rule of law".[6] In terms of Article 6(1), member states must refrain from taking any measures "likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty". Article 6(2) prohibits discrimination against any person on various listed grounds, including race.

[9] Article 16(1) of the Treaty required the Tribunal to be established to ensure adherence to and the proper interpretation of the Treaty. In terms of Article 16(2), the composition, powers, functions, procedures and other related matters governing the Tribunal were to be prescribed in a protocol adopted by the Summit, being SADC's supreme policy-making institution and comprising the Heads of State or Governments of member states.[7]

[10] In August 2000 the Summit adopted a protocol to establish the Tribunal[8] (2000 Protocol). In terms of Article 14 of the 2000 Protocol, one of the matters over which the Tribunal had jurisdiction was the interpretation and application of the SADC Treaty. In terms of Article 15, the Tribunal had jurisdiction over disputes between states and between natural or legal persons and states. In the case of natural or legal persons, this right of access was subject to exhausting remedies under domestic jurisdiction.

[11] In order to come into force, the 2000 Protocol had to be ratified by two-thirds of the member states. Although this did not happen, the 2000 Protocol was integrated into the SADC Treaty with effect from 14 August 2001 by an amendment agreed to by the requisite three-quarters of member states.[9]

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[6] Article 4(c) of the SADC Treaty.

[7] The establishment and functions of the Summit are provided for in Articles 9(1)(a) and 10 of the SADC Treaty.

[8] Protocol on Tribunal in the Southern African Development Community, 7 August 2000.

[9] Agreement Amending the Treaty of the Southern African Development Community, 14 August 2001. Article 18 of this Agreement amended Article 16(2) of the Treaty by stating that the Protocol formed an integral part of the Treaty.

[12] Five of the plaintiffs[10] were among 79 claimants whose claims were adjudicated by the Tribunal in a decision delivered on 28 November 2008[11] (*Campbell* decision). The Tribunal held that it had jurisdiction; that the claimants had been denied access to the Zimbabwean courts; that they had been discriminated against on grounds of race; and that fair compensation was payable to them for land compulsorily acquired by Zimbabwe. The Tribunal held, further, that Zimbabwe was in breach of its obligations under Articles 4(c) and 6(2) and that section 16B of Zimbabwe's Constitution breached Articles 4(c) and 6(2). Zimbabwe was directed to take all necessary measures to protect the possession, occupation and ownership of the claimants' land, except for three named claimants who had already been evicted and to whom Zimbabwe was directed to pay fair compensation.[12]

[13] Zimbabwe did not comply with the *Campbell* decision. Confiscations and evictions continued. Two of the 79 claimants[13] approached the Tribunal for further relief. On 5 June 2009, the Tribunal ruled that Zimbabwe had failed to comply with the *Campbell* decision.[14] The Tribunal decided to report its finding to the Summit pursuant to Article 32(5) of the 2000 Protocol.[15]

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[10] These five plaintiffs are the present seventh, eighth, tenth, eleventh and fifteenth respondents, namely Mike Campbell (Pvt) Ltd, Mr Richard Thomas Etheridge, Tengwe Estates (Pvt) Ltd, Mr Christopher Mellish Jarrett and France Farm (Pvt) Ltd. Another claimant, Mr William Michael Campbell, was the main shareholder and director of Mike Campbell (Pvt) Ltd. He died in April 2011, allegedly due to complications from the injuries sustained at the hands of farm invaders and agents of the Zimbabwean Government. The numbering of the respondents in the present proceedings is identical to their numbering as plaintiffs in the pending action.

[11] *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* (2/2007) [2008] SADCT 2.

[12] These three claimants are the present tenth, eleventh and fifteenth respondents – Tengwe Estates (Pvt) Ltd, Mr Christopher Mellish Jarrett and France Farm (Pvt) Ltd.

[13] These two claimants were Mr Campbell (see above n 10) and Mr Etheridge, the present eighth respondent.

[14] *Campbell v Republic of Zimbabwe* (03/2009) [2009] SADCT 1.

[15] Article 32(5) stated that, if the Tribunal established the existence of a failure by a member state to comply with a decision of the Tribunal, "it shall report its finding to the Summit for the latter to take appropriate action".

[14] On 14 August 2009 the Tribunal handed down its decision in a claim brought by the present first respondent[16] (*Tembani* decision). The Tribunal held that the claimant had exhausted all domestic remedies; that he had been denied access to the Zimbabwean courts; that Zimbabwe was in breach of its obligations under Articles 4(c) and 6(1) of the Treaty; that the sale in execution and transfer of the claimant's farm were illegal and void; and that his title to the property remained valid. Zimbabwe was directed to take various measures to safeguard the claimant's position in relation to the property.

[15] Zimbabwe continued to act in defiance of the *Campbell* and *Tembani* decisions. Zimbabwe asserted that the 2000 Protocol was not binding on it because it had not been ratified by the requisite two-thirds of the total SADC membership or by Zimbabwe itself.

[16] Certain of the claimants in the *Campbell* matter applied to the High Court in South Africa to have the *Campbell* decision recognised and enforced in terms of Article 32 of the 2000 Protocol.[17] On 13 January 2010, the High Court authorised the issuing of the enforcement application and gave directions for service.[18] On 25 February 2010, the High Court ordered, in default of opposition by Zimbabwe, that the Tribunal's decisions in *Campbell*, delivered on 28 November 2008 and 5 June 2009, were to be recognised and enforced in terms of Article 32.[19]

[17] Zimbabwe applied for the rescission of the High Court's orders of 13 January 2010 and 25 February 2010. On 6 June 2011 the High Court dismissed the

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[16] *Tembani v Republic of Zimbabwe* (07/2008) [2009] SADCT 3. The claimant was the present first respondent, Mr Luke M Tembani. He is the owner of the present second respondent, LMT Estates (Pvt) Ltd.

[17] Article 32(1) provided that the law and rules of civil procedure for the registration and enforcement of foreign judgments in force in a territory of the state in which enforcement is sought shall govern the enforcement of decisions of the Tribunal. Article 32(2) requires states and institutions of SADC to take forthwith all measures necessary to ensure execution of decisions of the Tribunal.

[18] *Fick v Government of the Republic of Zimbabwe*, unreported judgment of the North Gauteng High Court, Pretoria, Case No 77880/2009 (13 January 2010).

[19] *Fick v Government of the Republic of Zimbabwe*, unreported judgment of the North Gauteng High Court, Pretoria, Case No 77881/2009 (25 February 2010).

rescission applications.[20] On 20 September 2012, the Supreme Court of Appeal dismissed Zimbabwe's appeal against the High Court's judgment.[21]

[18] A further appeal by Zimbabwe to this Court was dismissed on 27 June 2013.[22] This Court held that:

(a) the SADC Treaty as amended was binding on South Africa and Zimbabwe;

(b) Zimbabwe, through its agreement to be bound by the 2000 Protocol, had waived its right to rely on sovereign immunity from the jurisdiction of South African courts, which it would otherwise have enjoyed in terms of the Foreign States Immunities Act;[23]

(c) although the Tribunal's decision did not fall within the scope of the Enforcement of Foreign Civil Judgments Act,[24] it should be recognised under our common law as developed so as to include not only foreign domestic courts but also bodies such as the Tribunal;

(d) the Tribunal had had jurisdiction to make its decision in the *Campbell* case; and

(e) both Zimbabwe and South Africa were duty-bound to assist in the execution of the Tribunal's decision.

[19] In the meanwhile, non-compliance with decisions of the Tribunal was being considered by the SADC Summit, which commissioned a report by SADC's Committee of Ministers of Justice and Attorneys-General. The initial outcome of these developments was a decision by the Summit on 20 May 2011 not to reappoint the Tribunal's members whose terms of office had expired or were soon to expire. The effect of this decision was to suspend the operations of the Tribunal. South Africa's

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[20] *Government of the Republic of Zimbabwe v Fick* [2011] ZAGPPHC 76.

[21] *Government of the Republic of Zimbabwe v Fick* [2012] ZASCA 122.

[22] *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC).

[23] 87 of 1981.

[24] 32 of 1988.

Head of State at that time was President Zuma. Although he was not present at the Summit meeting, he supported these decisions through representation.

[20] At the time of the Summit's effective suspension decision on 20 May 2011, the South African courts had not yet adjudicated Zimbabwe's rescission applications. Zimbabwe's attempts at rescission finally failed in this Court on 27 June 2013. On 18 August 2014, the SADC Summit resolved to adopt a new protocol[25] (2014 Protocol) in place of the 2000 Protocol. President Zuma was present at this Summit meeting. He supported the resolution and signed the 2014 Protocol.

[21] In terms of Article 33 of the 2014 Protocol, the Tribunal's jurisdiction was confined to the interpretation of the SADC Treaty and Protocols in disputes between member states. In other words, the right of private parties to bring disputes before the Tribunal was abolished. In terms of Article 48, the 2000 Protocol was to be repealed with effect from the date of the coming into force of the 2014 Protocol, something that would occur 30 days after the deposit of instruments of ratification by two-thirds of the member states.[26]

[22] 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. In July 2015, five of the present respondents[27] were among a group of persons who applied to join as applicants in LSSA's application. Their intervention application was granted. The present first respondent, Mr Tembani, signed the founding affidavit on behalf of this group on 21 July 2015.

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[25] Protocol on the Tribunal in the Southern African Development Community, 18 August 2014.

[26] See Article 53 of the 2014 Protocol.

[27] The first, eighth, tenth, eleventh and fifteenth respondents.

[23] On 1 March 2018 a Full Court of the High Court delivered judgment.[28] As part of its order, the High Court declared that President Zuma's participation in suspending the SADC Tribunal in 2011 and his subsequent signing of the 2014 Protocol had been unlawful, irrational and thus unconstitutional. In terms of section 172(2)(a) of the Constitution, the High Court referred its order to this Court for confirmation.

[24] This Court's judgment in the confirmation application was delivered on 11 December 2018[29] (*Law Society*). The Court rejected a contention by the President that the LSSA's application was premature. This argument was based on the fact that the Protocol had not yet been approved by South Africa's Parliament[30] and had not yet been signed by the prescribed number of states or ratified by any of the member states.[31]

[25] On the merits of the case, this Court spoke of the events culminating in the 2014 Protocol as—

> "a master plan 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.
>
> In all of the above efforts to paralyse the Tribunal, Zimbabwe had a willing ally in South Africa, as represented by our President. The non-appointment of new Judges and non-renewal of expired terms was a scheme designed to ensure that the Tribunal would not function because it would not be quorate. Added to this mix was the decision to impose a moratorium on the referral of individual disputes to the Tribunal and the signing of the Protocol that seeks to essentially make this state of affairs permanent."[32]

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[28] *Law Society of South Africa v President of the Republic of South Africa* [2018] ZAGPPHC 4; [2018] 2 All SA 806 (GP); 2018 (6) BCLR 695 (GP).

[29] *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) SA 30 (CC); 2019 (3) BCLR 329 (CC) (*Law Society*).

[30] As required by section 231(2) of the Constitution, which provides that "[a]n international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)".

[31] *Law Society* above n 29 at paras 21-2.

[32] Id at paras 44-5.

[26] This Court held that, because the 2000 Protocol had been integrated into the SADC Treaty, it could only be tampered with in terms of the provisions of the Treaty that regulate its amendment. This could not properly be done by a protocol.[33] By supporting the 2011 suspension decision and by signing the 2014 Protocol, President Zuma was held to have acted irrationally[34] and contrary to South Africa's international law obligations under the Treaty.[35] His conduct was also found to have been unlawful in that "he failed to act in good faith and in pursuit of the object and purpose of the Treaty we have bound ourselves to".[36] President Zuma's signing of the 2014 Protocol was held to be unconstitutional for the further reason that it was contrary to his obligation to refrain from action undermining our Bill of Rights and international law obligations.[37]

[27] This Court thus confirmed the High Court's order of constitutional invalidity in the following terms:

> "1.1 The President's participation in the decision-making process and his own decision to suspend the operations of the [Tribunal] are unconstitutional, unlawful and irrational.
>
> 1.2 The President's signature of the [2014 Protocol] is unconstitutional, unlawful and irrational.
>
> 1.3 The President is directed to withdraw his signature from the 2014 Protocol."[38]

[28] Mr Ramaphosa had succeeded Mr Zuma as the country's President on 15 February 2018, two weeks before the High Court delivered judgment in *Law Society*. In ordering the President to withdraw his signature from the 2014 Protocol, this Court

[33] Id at para 49.

[34] Id at paras 70-1.

[35] Id at para 53.

[36] Id at para 56.

[37] Id at paras 77-85.

[38] Id at para 97.

noted that one President is a successor in title to another and the obligations are similarly transferable from one to the other. The relevant presidential duties were not "incumbent-specific".[39]

Litigation history

Pre-litigation notices

[29] On 14 December 2018 the plaintiffs' attorneys delivered to the President and State Attorney a notice in terms of section 3(1)(a) of the Institution Act, giving notice that 10 of the present respondents intended to institute legal proceedings against the President and Government for damages. The proposed claims were summarised in the notice. On 14 January 2019 the State Attorney replied that the President, while not acknowledging or admitting the claims, contended that the notice had not been sent within the period prescribed by the Institution Act.

[30] On 15 January 2019 the plaintiffs' attorneys served a supplementary notice in terms of section 3(1)(a), now identifying all the present respondents as claimants.[40] This notice received a similar response from the State Attorney.

The action

[31] The plaintiffs served their summons on 9 April 2019. They simultaneously served an application for condonation, insofar as needs be, for their failure to comply timeously with section 3(1)(a) of the Institution Act. In terms of section 3(2), such a notice must be served "within six months from the date on which the debt became due". The plaintiffs' primary contention was that they did not need condonation because the debts only became due when this Court delivered judgment in *Law Society*, in other words, that this Court's judgment was necessary to complete their causes of action.

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[39] Id at para 94.

[40] The supplementary notice added the various Zimbabwean companies with which the persons identified in the initial notice were associated and apportioned the claimed damages between the individuals and the companies.

[32] The defendants filed an affidavit opposing condonation, to which the plaintiffs replied. Among other grounds of opposition, the defendants disputed that this Court's judgment in *Law Society* was an element of the plaintiffs' 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 Mr Tembani signed the founding affidavit in support of intervention in the LSSA's application). This meant, so the defendants contended, that the debts became prescribed on 18 August 2017 or 21 July 2018. From this it followed, so the defendants submitted, that in terms of section 3(4)(b)(i) of the Institution Act, the High Court did not have the power to condone non-compliance with the six-month time limit for serving the section 3(1)(a) notice.[41]

[33] The opposing affidavit criticised the particulars of claim in certain respects, which led to amendments in October 2019 and January 2020. In February 2020, the defendants served a notice in terms of rule 23(1) of the Uniform Rules of Court, identifying various respects in which the amended particulars of claim were said to be vague and embarrassing and inviting the plaintiffs to remove the causes of complaint. When no further amendments were forthcoming, the defendants on 18 March 2020 served an exception setting out five grounds of exception.

[34] In broad summary, the amended particulars of claim made the following allegations:

(a) Prior to the adoption of the 2014 Protocol, all the plaintiffs had claims justiciable by the Tribunal.

(b) The plaintiffs' claims in Zimbabwe's courts were ousted, so they could only seek relief against Zimbabwe in the Tribunal.

(c) Certain of the plaintiffs obtained awards in their favour from the Tribunal in the *Campbell* and *Tembani* cases.

[41] The relevant provisions of section 3 of the Institution Act are quoted in [68] of this judgment.

(d) The remaining plaintiffs would have instituted claims in the Tribunal and succeeded but for the SADC Summit's 2011 suspension of the Tribunal and the Summit's adoption of the 2014 Protocol.

(e) The plaintiffs highlight key findings made by the High Court and this Court in *Law Society*.

(f) In being party to the 2011 and 2014 decisions, President Zuma failed to act in good faith within the scope of section 231(1) of the Constitution and with gross disregard for the violation of the plaintiffs' human rights.

(g) The 2011 suspension decision and the adoption of the 2014 Protocol required unanimous consent. Accordingly, and but for President Zuma's participation, the abolition of individual access to the Tribunal would not have occurred.

(h) President Zuma, representing the South African Government, acted wrongfully and unlawfully and with a deliberate, reckless or grossly negligent disregard for the rights of those affected by the abolition of individual access to the Tribunal.

(i) In so acting, President Zuma, representing the South African Government, grossly violated his constitutional duties, particularly section 231(1)[42] read with sections 1[43] and 7(2)[44] of the Constitution and infringed the plaintiffs' constitutional rights to property and access to justice.

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[42] Section 231(1) provides: "The negotiating and signing of all international agreements is the responsibility of the national executive."

[43] Section 1 reads:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
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> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the Constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[44] Section 7(2) provides: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

(j) As a result, the plaintiffs suffered pecuniary loss and the individual plaintiffs also suffered damages for pain and suffering. The claimed damages total R1 957 578 594, of which R12 million represents general damages.[45]

(k) If it is found that common law remedies do not allow the claims for general damages and that the common law should not be developed to allow such damages, these amounts are claimed as constitutional damages as just and equitable relief.

(l) The President and Government are jointly and severally liable to pay these damages.

(m) There has been compliance with the Institution Act.

[35] The defendants advanced the following five grounds of exception:

(a) Ground 1 (causation exception): The particulars of claim lacked sufficient averments to establish that the defendants were the cause of the plaintiffs' alleged losses. In this regard, the plaintiffs did not allege that President Zuma's signing of the 2014 Protocol brought it into force and it has not yet entered into force. On 11 December 2018 this Court ordered the President to withdraw his signing of the Protocol.

(b) Ground 2 (legal duty exception): The plaintiffs failed to plead on what basis President Zuma's conduct was delictually wrongful and insufficient facts were pleaded to sustain any such duty. President Zuma's conduct was not alleged to have been dishonest or fraudulent. The majority of the plaintiffs were Zimbabwean citizens and companies, and it was not alleged on what basis the President owed a legal duty to foreigners not to cause economic loss outside of South Africa.

(c) Ground 3: The particulars of claim did not disclose a basis for the contention that Mr Tembani's company, the present second respondent,

[45] R1 200 000 for each of the 10 individual plaintiffs.

is entitled to the benefit of the Tribunal's decision in favour of Mr Tembani.

(d) Ground 4: The plaintiffs' claims included claims for loss of income, loss of movable property and for pain and suffering, which claims were not ousted by section 16B of the Zimbabwean Constitution.

(e) Ground 5: The basis on which such damages were claimed was unclear and there were insufficient averments to support the appropriateness of developing the common law or of making an award of constitutional damages.

[36] The condonation application and exception were argued together. Since neither side is pursuing an appeal in respect of grounds 3, 4 and 5 of the exception, I will not deal with those grounds.

High Court's judgment

[37] The High Court (Van Oosten J) agreed with the plaintiffs that this Court's *Law Society* judgment completed their causes of action. The plaintiffs were neither required nor able to proceed with their action until a court by judicial review had set aside the President's participation in the 2011 suspension decision and adoption of the 2014 Protocol. By virtue of section 172(2)(a) of the Constitution, a declaration that President Zuma acted unconstitutionally had no effect until confirmed by this Court.[46] The plaintiffs thus did not need condonation.

[38] In regard to the causation exception, the High Court considered both factual and legal causation. On factual causation, the High Court considered that the pleaded facts did not contain sufficient averments to show "a causal or proximate cause" between President Zuma's conduct and the alleged damages. The SADC Treaty allowed for the

[46] Section 172(2)(a) provides that the Supreme Court of Appeal and the High Court (and other courts of similar status) may make an order concerning the constitutional validity of any conduct of the President, "but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court".

dissolution of the Tribunal by majority vote. Even if President Zuma had opposed dissolution, this would thus have made no difference.

[39] Furthermore, whatever the effect of President Zuma's signing of the 2014 Protocol may have been, this Court ordered the President to withdraw the signature, which in fact occurred.[47] This, so the High Court reasoned, "thwarted the 'conspiracy' to curtail the jurisdiction of the Tribunal". Formal ratification of the 2014 Protocol in any event never happened. The High Court thus upheld the factual causation exception.

[40] On legal causation, the High Court said that whether a defendant's conduct is too remote for legal liability to ensue is a flexible test, "assessed in the light of what legal policy, reasonability, fairness and justice require". The High Court referred to *Burmilla Trust*,[48] where Tuchten J dealt with an exception to claims for damages arising from President Zuma's participation in dismantling the Tribunal. Tuchten J considered that "morality, the convictions of the South African community and policy do not require that South Africa should be held liable to compensate a non-national where the South African Government breached international law in circumstances such as the present".[49] The High Court in the present case agreed with Tuchten J and thus upheld the legal causation exception in relation to the 19 plaintiffs who are Zimbabwean citizens or Zimbabwean companies.

[41] In regard to the legal duty exception, the High Court referred to this Court's judgment in *Steenkamp*,[50] where it was said, among other things, that (a) not every breach of a public law duty causing financial loss is equivalent to unlawfulness in a

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[47] The fact that President Ramaphosa caused the President's signature to be withdrawn from the 2014 Protocol did not form part of the pleadings, but the case appears to have been argued on the basis of an acceptance that this did indeed occur. According to public reports, this occurred during August 2019 at the 39th SADC Summit.

[48] *Trustees for the time being of the Burmilla Trust v Van Zyl* [2020] ZAGPPHC 802; [2021] 1 All SA 578 (GP).

[49] Id at para 67.

[50] *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

delictual liability sense[51] and (b) there were compelling public considerations for not imposing delictual liability for "incorrect or negligent but honest decisions", though different public policy considerations might apply to such a decision "made in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision".[52]

[42] The High Court considered that the plaintiffs' allegations that President Zuma failed to act in good faith within the scope of section 231(1) and that he displayed a "deliberate, reckless or grossly negligent disregard" for the rights of those affected by the abolition of individual access to the Tribunal would, if proved, deprive the defendants of their *Steenkamp* immunity. This was buttressed, in the High Court's view, by the fact that in *Law Society* this Court found that the President had not acted in good faith and that the exercise of his power had fallen outside the legitimate scope of section 231(1) of the Constitution. The High Court thus rejected the legal duty exception.

[43] For the sake of completeness, I record that the High Court considered that ground 3 of the exception should more appropriately be dealt with in pre-trial procedures; and rejected grounds 4 and 5 of the exception.

[44] Paragraphs 1 to 4 of the High Court's order dealt with the exceptions. Paragraph 5 stated, "[n]o order is made as to the costs of the condonation application and the exception". In terms of paragraph 6, the plaintiffs were granted leave to amend their particulars of claim by delivering a notice of amendment by a specified date.

[45] The High Court granted the plaintiffs and defendants leave to appeal and cross-appeal to the Supreme Court of Appeal. It did so on terms contained in a draft order to which the parties had agreed. The High Court stated that it fully associated

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[51] Id at para 37.

[52] Id at para 55(a).

itself with the draft order. Paragraphs 3, 4 and 5 of the order granting leave to appeal read:

> "3. The defendants are given leave to appeal to the Supreme Court of Appeal against the order to the extent that the Court did not grant an order dismissing the plaintiffs' condonation application.
>
> 4. Subject to the right of either party to seek leave to appeal from the Constitutional Court against a judgment by the Supreme Court of Appeal, the defendants accept that the determination of the condonation application by the Supreme Court of Appeal will finally determine the issue of whether the plaintiffs' claims have prescribed.
>
> 5. The plaintiffs and the defendants are granted leave to appeal to the Supreme Court of Appeal against paragraph 5 of the order."

The Supreme Court of Appeal's judgment[53]

[46] The Supreme Court of Appeal's approach to the exceptions was to postulate, with reference in particular to this Court's judgment in *Fetal Assessment Centre*,[54] that

(a) there may be occasions when the question of the development of the common law is better deferred until all the evidence has been heard, particularly where the factual situation is complex and the legal position uncertain;

(b) the need to have regard to the facts of the case and a range of policy issues militates against deciding, on exception, the viability of a claim based on a novel legal duty; and

(c) a court must be satisfied that a novel claim is necessarily inconceivable under our law, as potentially developed under section 39(2) of the Constitution, before it can uphold an exception premised on the non-disclosure of a cause of action.

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[53] *Tembani v President of the Republic of South Africa* [2022] ZASCA 70; 2023 (1) SA 432 (SCA).

[54] *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC); 2015 (2) BCLR 127 (CC).

[47] As to the plaintiffs' appeal against the High Court's orders on the causation exception, the Supreme Court of Appeal considered that ground 1 of the exception was confined to factual causation and that the High Court had erred in dealing with legal causation. As to factual causation, the High Court had, in the Supreme Court of Appeal's opinion, conflated questions of factual and legal causation. In particular, "proximate cause" relates to legal causation. The upshot, in the Supreme Court of Appeal's view, was that the High Court's judgment on the factual causation exception could not be supported.

[48] In regard to the defendants' cross-appeal on the legal duty exception, the Supreme Court of Appeal relied on authority in that Court[55] for the proposition that the dismissal of an exception is not appealable as it does not finally dispose of the issue raised by the exception.

[49] In regard to the defendants' cross-appeal on the condonation issue, the Supreme Court of Appeal reasoned that, since the High Court had made no order on the condonation application, there was no relevant order against which the defendants could appeal. The Supreme Court of Appeal inferred that the High Court had granted leave to appeal to enable the defendants to challenge the High Court's conclusion that the plaintiffs' claims had not prescribed. This was impermissible, said the Supreme Court of Appeal, because an appeal lies only against a court's order, not its reasons. Furthermore, a special defence such as prescription should ordinarily be raised in a special plea, which allows the plaintiff to neutralise the special plea by way of permissible grounds of replication. In the Supreme Court of Appeal's view, the High Court should, for these reasons, have refrained from entertaining what was in any event a conditional condonation application.

[55] In particular, *Maize Board v Tiger Oats Ltd* [2002] ZASCA 74; [2002] 3 All SA 593 (A) at para 14.

[50] The Supreme Court of Appeal thus upheld the plaintiffs' appeal against the upholding of the causation exception and struck the defendants' cross-appeal from the roll.

Submissions in this Court on condonation and prescription

[51] For reasons that will become apparent, I shall only summarise the parties' submissions on the related questions of condonation and prescription.

The applicants / defendants

[52] The defendants submit that the plaintiffs' claims prescribed three years after 18 August 2014, when the Summit adopted the 2014 Protocol, and in any event not later than three years after 21 July 2015, when the first plaintiff, Mr Tembani, made an affidavit in support of the intervention of some of the plaintiffs in the LSSA's application. According to the defendants, that affidavit shows that at the latest by 21 July 2015, the plaintiffs had knowledge of the facts from which the defendants' alleged indebtedness arose.

[53] The defendants criticise the High Court's reasoning on the basis that, according to binding authority, including this Court's decision in *Mtokonya*,[56] a creditor need only have knowledge of the relevant facts and that ignorance of legal conclusions is irrelevant to the running of prescription. The alleged unconstitutionality and unlawfulness of President Zuma's conduct is a legal conclusion. This Court's declaration in *Law Society* was not a factor relevant to the running of prescription. A creditor is not entitled to await binding judicial pronouncements before a debt becomes due.

[54] As to the plaintiffs' reliance, in the alternative, on the institution of the *Law Society* application, or the intervention of some of the plaintiffs in that application,

[56] *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC) (*Mtokonya*).

as an act of interruption in terms of section 15(1) of the Prescription Act,[57] the defendants contend that the *Law Society* application was not one by which the plaintiffs were claiming payment of the debts at issue in the action. The constitutional relief claimed in *Law Society* was not a "debt" for purposes of the Prescription Act. Unlike *Allianz*,[58] the declaratory relief sought in *Law Society* was not based on the same cause of action as the claims advanced in the subsequent action. In *Law Society*, the Court was not asked to determine that the President had any delictual liability to the plaintiffs. The defendants submit that reliance on section 15(1) should fail for similar reasons as in *Saamwerk Soutwerke*.[59] In any event, say the defendants, this act of interruption could only benefit the five plaintiffs who intervened in *Law Society*.

[55] The defendants submit that the Supreme Court of Appeal erred in concluding that an appeal did not lie against the High Court's decision on the plaintiffs' condonation application. If condonation should have been refused on the basis that the debts were prescribed, the defendants were entitled to an order dismissing the condonation application. The appeal to the Supreme Court of Appeal was aimed at undoing the result of the High Court's decision, which was final in effect. The defendants argue that a litigant is entitled to appeal against the failure by a court of first instance to grant an order that was prayed for and to which the litigant was entitled. In that regard, they cite *Public Protector*,[60] where this Court entertained an appeal against the failure of the High Court to entertain the relief sought by amaBhungane as an intervening claimant.

[56] As to whether prescription lent itself to determination on the papers, the defendants argue that the Institution Act necessitates such a determination. Citing

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[57] 68 of 1969.

[58] *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C); [1990] 1 All SA 30 (C) (*Allianz*).

[59] *Saamwerk Soutwerke (Pty) Ltd v Minister of Mineral Resources* [2017] ZASCA 56.

[60] *Public Protector v President of the Republic of South Africa* [2021] ZACC 19; 2021 (6) SA 37 (CC); 2021 (9) BCLR 929 (CC) (*Public Protector*).

Links,[61] they submit that, if a claimant needs to apply for condonation, the effect of section 3(4)(b)(i) is that prescription has to be dealt with and determined as part of that application.

The respondents / plaintiffs

[57] The plaintiffs support the High Court's conclusion that this Court's judgment in *Law Society* completed their causes of action. President Zuma's conduct remained of full force and effect until the declaration of unconstitutionality was confirmed by this Court. The invalidity of President Zuma's signature to the 2014 Protocol was a necessary element of the plaintiffs' causes of action, something they would have to prove at the trial. Until this Court confirmed the declaration of invalidity, the High Court would have had to treat President Zuma's conduct as constitutionally valid and could thus not have determined the question of wrongfulness. The plaintiffs refer, in that regard, to sections 167(4)(e), 167(5) and 172(2)(a) of the Constitution.[62]

[58] The plaintiffs point to the fact that it was only in the President's answering affidavit in *Law Society* that the President disclosed that the Summit operated on the basis of consensus decision-making and that the 2014 Protocol was adopted unanimously. The onus rested on the President to establish when prescription began to run, including the date on which the plaintiffs acquired knowledge of the relevant facts. The Supreme Court of Appeal was right, according to the plaintiffs, to defer the question of prescription to the stage of a special plea in the action. This, so the plaintiffs argue, causes the defendants no prejudice, because the defendants will be entitled to raise the same defence in a plea – the issue is not *res judicata* (finally determined).

[59] The plaintiffs persist with their alternative argument that the *Law Society* application interrupted the running of prescription. Invoking *Allianz*, they say that it matters not that the plaintiffs who intervened in that case did not advance a monetary

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[61] *Links v Member of the Executive Council, Department of Health, Northern Cape Province* [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656 (CC) (*Links*) at para 12.

[62] These provisions are quoted in [87] below.

claim. This Court's declaration disposed of an element of their claims against the defendants. The plaintiffs cite a Namibian case, *Lisse*,[63] in support of the proposition that an application for review relief can interrupt prescription in respect of a delictual claim arising from the conduct found in the review to have been unlawful.

The issues in this Court

[60] The main issues raised by this case, on the related questions of condonation and prescription are these:

(a) Is this Court's jurisdiction engaged?

(b) Is it in the interests of justice to grant leave to appeal?

(c) In regard to condonation and prescription:

  (i) was the Supreme Court of Appeal right to hold that the High Court made no appealable order?

  (ii) if not, when did prescription start to run?

  (iii) if prescription started to run on or before 21 July 2015, did the service of the *Law Society* application or the intervention application interrupt the running of prescription?

(d) In regard to the factual causation exception (if it is reached), was the High Court right to uphold this ground?

(e) In regard to legal causation (if it is reached):

  (i) did the defendants' exception cover legal causation?

  (ii) if so, was the High Court right to uphold this ground of exception in relation to the Zimbabwean plaintiffs?

(f) In regard to the legal duty exception (if it is reached):

  (i) did the Supreme Court of Appeal err in holding that the High Court's dismissal of this ground was not appealable?

  (ii) if so, should the High Court have upheld this ground of exception?

(g) Remedy and costs.

[63] *Lisse v Minister of Health and Social Services* [2014] NASC 24; 2015 (2) NR 381 (SC) (*Lisse*).

Jurisdiction and leave to appeal

[61] In regard to condonation and prescription, whether this Court's judgment in *Law Society* was necessary to complete the plaintiffs' causes of action is a constitutional matter as contemplated in section 167(3)(b)(i) of the Constitution,[64] because it concerns the ingredients of a delictual claim based on conduct of the President which is alleged to have violated the Constitution. It is also an arguable point of law of general public importance as contemplated in section 167(3)(b)(ii).[65]

[62] Whether an application for constitutional relief of the kind sought in *Law Society* can interrupt prescription in respect of a delictual debt subsequently pursued by way of action is an arguable point of law of general public importance which ought to be considered by this Court. It involves a consideration of the approach adopted in *Allianz* and the proper scope of that approach. More generally, questions of prescription are constitutional matters because they impact on the right of access to courts guaranteed by section 34 of the Constitution.[66]

[63] If the exceptions are reached, the legal duty exception has a constitutional dimension. The question whether conduct in a novel setting should be treated as wrongful for delictual purposes involves legal and public policy, the content of which is informed by the Constitution.[67] This is particularly so here, where the conduct is that of the President and where alleged violations of the Constitution form part of the case

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[64] Section 167(3)(b)(i) provides that the Constitutional Court "may decide . . . constitutional matters".

[65] Section 167(3)(b)(ii) provides that the Constitutional Court "may decide . . . any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court". On the test for jurisdiction under this provision, see *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 16-28. See also, for example, *Shiva Uranium (Pty) Limited (In Business Rescue) v Tayob* [2021] ZACC 40; 2022 (2) BCLR 197 (CC); 2022 (3) SA 432 (CC) at para 27 and *Big G Restaurants (Pty) Limited v Commissioner for the South African Revenue Service* [2020] ZACC 16; 2020 (6) SA 1 (CC); 2020 (11) BCLR 1297 (CC) at paras 11-5.

[66] *Mtokonya* above n 56 at para 9; *Loni v Member of the Executive Council, Department of Health, Eastern Cape Bhisho* [2018] ZACC 2; 2018 (3) SA 335 (CC); 2018 (6) BCLR 659 (CC) at para 20.

[67] *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 34; *BE obo JE v MEC for Social Development, Western Cape* [2021] ZACC 23; 2021 (10) BCLR 1087 (CC); 2022 (1) SA 1 (CC) at para 7.

for delictual wrongfulness. Similar questions of policy arise in relation to legal causation, if it is covered by the defendants' exception.

[64] On leave to appeal, prospects of success are an important consideration. Such prospects exist here. Since a trial is likely to impose significant burdens in time and costs on the litigants, it is desirable to dispose of these questions upfront if this can properly be done. It is thus in the interests of justice to grant leave to appeal.

Condonation / prescription

[65] The issues that arise in respect of condonation / prescription must be determined on the assumption that the plaintiffs' pleaded case discloses a cause of action for recovery of the damages claimed, even though this is hotly contested by the exception.

Relevant statutory provisions

[66] It is not in dispute that the Institution Act applies to the plaintiffs' claims. "Debt" is defined in that Act as a debt arising from, among others, a delictual cause of action for which an "organ of state" is liable for payment of damages. "Organ of state" is defined as including "any functionary or institution exercising a power or performing a function in terms of the Constitution".

[67] It is also not in dispute that, by virtue of section 2(2) of the Institution Act, the Prescription Act determines the period of prescription applicable to the debts which the plaintiffs are claiming. In terms of section 11(d) of the Prescription Act, that period is three years.

[68] Section 3 of the Institution Act provides in relevant part:

> "(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless—

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

. . .

(2) A notice must—

(a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and

(b) briefly set out—

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.

(3) For purposes of subsection (2)(a)—

(a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

. . .

(4)

(a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that—

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure."

[69] In terms of section 5(2) of the Institution Act, legal proceedings governed by the Act may not be served before the expiry of 60 days after the notice was served on the organ of state unless, prior to the expiry of the 60 days, the organ of state in writing repudiates liability.

[70] Section 12(1) of the Prescription Act provides that, subject to subsections (2), (3) and (4), prescription shall commence to run "as soon as the debt is due". Section 12(2) states that, if the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not start to run until the creditor becomes aware of the existence of the debt. Section 12(3) provides that a debt shall not be deemed to be due "until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises", subject to the proviso that a creditor "shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care". Subsections 12(2) and (3) of the Prescription Act thus substantially mirror section 3(3)(a) of the Institution Act.

[71] Section 15 of the Prescription Act deals with the judicial interruption of prescription. It reads in relevant part:

> "(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.
>
> (2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.
>
> . . .
>
> (4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.
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> . . .
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> (6) For the purposes of this section, 'process' includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced."

Is there anything against which the defendants could appeal?

[72] Although the High Court granted the defendants leave to appeal in respect of condonation / prescription, the Supreme Court of Appeal considered that there was no appealable order. The plaintiffs' condonation application was conditional on a finding that they needed condonation. The High Court found that they did not need condonation because time only started to run when this Court delivered its judgment in *Law Society*. Absent an order granting the condonation application, there was, in the Supreme Court of Appeal's view, nothing against which the defendants could appeal.

[73] The Supreme Court of Appeal's approach was too formalistic. It is true that a litigant who has no quibble with the actual order made by a court may not appeal merely because they dispute the court's reasoning.[68] The present case is quite different. The applicants brought a condonation application, in which they sought condonation "to the extent that this might be necessary". In substance, their notice of motion sought relief in the alternative from the High Court: a decision that they did not need condonation, alternatively the granting of condonation. The defendants opposed the condonation application, contending that condonation was indeed necessary and that it could not be granted because the debts which the plaintiffs wanted to pursue had prescribed. Their opposing affidavit concluded with a prayer that the condonation application be dismissed with costs, including the costs of two counsel.

[74] In terms of section 16(1) of the Superior Courts Act,[69] a litigant may seek leave to appeal a "decision" of the High Court. To hold that the High Court did not make a "decision" on the condonation application is to place form over substance. The defendants are not dissatisfied merely with the High Court's reasoning. They contend that the High Court should have found in their favour by dismissing the condonation application with costs. The matter can be tested by asking whether the defendants are

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[68] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2010 (5) BCLR 457 (CC); 2012 (4) SA 618 (CC) at para 71 and *Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355.

[69] 10 of 2013.

seeking some alteration to the orders granted by the High Court. The answer is yes. An alteration can include the addition of orders which the court of first instance should have made but failed to make.

[75] By making no formal order on the condonation application, the High Court in substance made a decision in favour of the plaintiffs on their primary contention, namely that they did not need condonation, and a decision adverse to the defendants, namely by rejecting their prayer for the dismissal of the condonation application.

[76] Moreover, in their condonation application the plaintiffs sought costs against the defendants on the attorney and client scale, even if the Court were to find that condonation was unnecessary. Conversely, the defendants in opposing the application sought costs against the plaintiffs. The High Court's discussion on the merits of the condonation application concluded with a statement, based on the preceding reasoning, that "no order is required to be made in the application for condonation save for the costs thereof".

[77] On the question of costs, the High Court stated that the plaintiffs had been the "successful parties in the condonation application" whereas the defendants had successfully pursued two of the five exceptions. The High Court did not agree with the plaintiffs' castigation of the defendants' conduct. Having regard to the respective successes of the parties, the High Court considered it just for each party to be responsible for their own costs. This was reflected in paragraph 5 of the order, which stated: "No order is made as to the costs of the condonation application and the exception."

[78] The High Court thus took its decision on the condonation application into account in determining the overall costs order. If the High Court had found in favour of the defendants rather than the plaintiffs on the condonation application, paragraph 5 of its order would have had to be revisited.

[79] The defendants cite *Public Protector*[70] in support of the proposition that the absence of an order does not render an appeal impermissible. That case is not altogether in point. There, the High Court in substance dismissed amaBhungane's claim for substantive relief on preliminary grounds,[71] even though – perhaps through oversight – it omitted to include a dismissal order in the relief granted at the end of the judgment.[72] On appeal, this Court held that the High Court should have considered amaBhungane's claim on its merits. AmaBhungane's application was remitted to the High Court for that purpose.[73]

[80] In the present case, the persons complaining about the High Court's treatment of the application are not those who sought substantive relief by way of the condonation application. Moreover, the High Court in the present case did not intend to dismiss the plaintiffs' condonation application and merely fail to record this in the order. The High Court expressly concluded that no order on the condonation application was needed.

[81] Nevertheless, for the reasons I have given, the High Court made an appealable "decision" on the condonation application. The appeal on that decision was properly before the Supreme Court of Appeal. Although the agreed terms on which the High Court granted leave to appeal were not binding on the Supreme Court of Appeal, the parties and the High Court sensibly and correctly recognised the substance of the matter.

Should prescription have been deferred to a special plea?

[82] If a creditor requires condonation in terms of section 3(4)(a) of the Institution Act and the debtor raises prescription as an objection in terms of section 3(4)(b)(i), the court

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[70] *Public Protector* above n 60.

[71] *President of the Republic of South Africa v Public Protector* [2020] ZAGPPHC 9; [2020] 2 All SA 865 (GP); 2020 (5) BCLR 513 (GP) at para 195.

[72] Id at para 214. The order did, however, provide that there would be no order as to costs in respect of amaBhungane: see para 5 of the order at para 214 (AmaBhungane was the sixth respondent referred to in para 5).

[73] *Public Protector* above n 60 at paras 6, 141-5 and 149.

must determine prescription as part of the condonation application.[74] Condonation is a threshold issue, and section 3(4)(b)(i) makes prescription part of the determination of that threshold issue.

[83] This causes no procedural prejudice to a creditor. If a debtor raises prescription in its answering affidavit, the creditor can, in its replying affidavit, advance any grounds of replication that may be available to it to neutralise prescription. If there are factual disputes, they can be referred to oral evidence. The fact that prescription can also be raised in a special plea is no reason not to deal with it as part of the creditor's condonation application.

When did the debts become due?

[84] If, subject to the requisite actual or constructive knowledge by the plaintiffs, the delictual debts in this case became "due" by 18 August 2014 (as contemplated in section 3(2)(a) of the Institution Act), and if the plaintiffs had the requisite knowledge by not later than 21 July 2015 (as contemplated in section 3(3)(a) of the Institution Act), they needed condonation in terms of section 3(4)(a) of the Institution Act, because their notices in terms of section 3(2) were only served in December 2018 and January 2019, more than six months after the debts became due. And if, by the time the condonation application was served in April 2019, the debts had prescribed, section 3(4)(b)(i) was an absolute bar to condonation.

[85] Subject to the requisite actual or constructive knowledge by the creditor, a delictual debt becomes "due", within the meaning of section 12(3) of the Prescription Act and section 3(2)(a) of the Institution Act, once the debtor's wrongful and deliberate or negligent conduct has caused the creditor to suffer damage. That is when the creditor is entitled in law to institute action for the recovery of damages.

[74] *Links* above n 61 at para 12.

[86] In terms of section 12(3) of the Prescription Act and section 3(3)(a) of the Institution Act, this is subject to the qualification that time does not start to run (that is, the debt is not deemed to be "due") until the creditor has actual or constructive knowledge of the identity of the debtor and the "facts from which the debt arises". The "facts" do not include that the debtor's conduct was wrongful or negligent or that the creditor has a right to sue the debtor, nor does it include legal conclusions that may be drawn from the facts.[75] This Court has cited with approval the proposition that time starts to run against a creditor when it has "the minimum facts that are necessary to institute action" and that the running of prescription is not postponed until the creditor "becomes aware of the full extent of its legal rights".[76]

[87] The plaintiffs do not contest these general principles. The point of contention has to do with the fact that the delictual conduct in question is conduct of the President which is alleged to have been in violation of the Constitution. In that regard, subsections 167(4)(e) and (5) of the Constitution provide:

> "(4) Only the Constitutional Court may—
>
> ...
>
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
>
> ...
>
> (5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

And section 172(2)(a) relatedly states:

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[75] *Mtokonya* above n 56 at paras 36-51.

[76] *Minister of Finance v Gore N.O.* [2006] ZASCA 98; 2007 (1) SA 111 (SCA); [2007] 1 All SA 309 (SCA) at para 17, quoted in *Mtokonya* id at para 48 and in *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* [2018] ZACC 7; 2018 (5) BCLR 527 (CC); [2018] 6 BLLR 531 (CC); (2018) 39 ILJ 1213 (CC) (*Pieman's Pantry*) at para 208.

> "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[88] The nub of the plaintiffs' argument is that, by virtue of the above provisions, they could not pursue a delictual claim, based on the alleged unconstitutionality of the President's conduct, until this Court made or confirmed a declaration that the President's conduct was unconstitutional.

[89] The first premise of the plaintiffs' argument is that a finding of delictual wrongfulness based on an alleged violation by the President of the Constitution requires a finding of constitutional invalidity within the meaning of these provisions of the Constitution. The plaintiffs accept that a violation of the Constitution does not without more give rise to delictual liability, but their pleaded case requires a finding of unconstitutional conduct as a component of delictual wrongfulness. I shall assume, without deciding, the correctness of this premise.

[90] The second premise is that, because a finding of constitutional invalidity has to be made or confirmed by this Court, the plaintiffs' causes of action were not completed until such an order was made by this Court. In other words, the second premise is that until this Court made its order the President's conduct had to be treated by a trial court as constitutional.

[91] The second premise, in my view, confuses what has to be decided with who has to decide it and when it has to be decided. If the President acted unconstitutionally in May 2011 and August 2014 in the manner alleged by the plaintiffs, his conduct was, objectively speaking, already unconstitutional then. If a court of competent jurisdiction later concludes that the President acted unconstitutionally, its conclusion is that he acted unconstitutionally when he performed the acts in question. The acts do not become

unconstitutional only from the time the court makes such a conclusion. This is in accordance with the doctrine of objective constitutional invalidity.[77]

[92] Having regard to the plaintiffs' pleaded case, a component of the wrongfulness alleged by them was that the President violated the Constitution by his conduct in 2011 and 2014. If the President indeed acted contrary to the Constitution at those times, that component of pleaded wrongfulness came into existence in 2011 and 2014. What the plaintiffs had to allege and prove was that the President acted unconstitutionally at those times. They did not need to allege and prove that another court had already found that the President so acted.

[93] What then is the implication of the sections of the Constitution on which the plaintiffs rely? Their written submissions focused on sections 167(5) and 172(2)(a). Although there was a passing reference to section 167(4)(e), the written submissions did not address this Court's jurisprudence on the scope of sections 167(4)(e) and 167(5) respectively. In oral argument, the plaintiffs' counsel highlighted section 165(4)(e), but there was still no engagement with the relevant jurisprudence. Unsurprisingly, the point was not anticipated or dealt with by the defendants' counsel.

[94] Section 167(4) confers exclusive jurisdiction on this Court in relation to the matters listed in that subsection. Matters of that kind cannot competently be brought in the High Court. Sections 167(5) and 172(2)(a), on the other hand, are complementary provisions dealing with cases in which the High Court can make declarations of

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[77] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (*Ferreira*); *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* [2001] ZACC 2; 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC) at para 11. In *Ferreira* the matter was put thus at para 27:

> "The Court's order does not invalidate the law; it merely declares it to be invalid. It is very seldom patent, and in most cases is disputed, that pre-constitutional laws are inconsistent with the provisions of the Constitution. It is one of this Court's functions to determine and pronounce on the invalidity of laws, including Acts of Parliament. This does not detract from the reality that pre-existing laws either remained valid or became invalid upon the provisions of the Constitution coming into operation. In this sense laws are objectively valid or invalid depending on whether they are or are not inconsistent with the Constitution. The fact that a dispute concerning inconsistency may only be decided years afterwards, does not affect the objective nature of the invalidity."

constitutional invalidity but where its declarations have no force or effect until confirmed by this Court.

[95] This Court's jurisprudence on the distinction between its exclusive and confirmatory jurisdiction has been guarded. The Court has preferred to deal with the issue on a case by case basis, rather than laying down precise rules. Two general trends can, however, be discerned:

(a) First, the grounds of exclusive jurisdiction in section 167(4)(e) should be narrowly construed so as not to render nugatory this Court's confirmatory jurisdiction and the related jurisdiction of other superior courts to make orders about the constitutional validity of the matters referred to in section 172(2)(a).[78]

(b) Second, exclusive jurisdiction is usually confined to those cases where the Constitution expressly imposes an obligation on Parliament or the President specifically and where the complaint is that Parliament or the President has not complied with that obligation.[79]

[96] As I shall explain presently, the alleged unconstitutional conduct of the President in this case falls within the scope of this Court's confirmatory jurisdiction, not its exclusive jurisdiction. But I do not think it ultimately matters for purposes of the prescription argument. The distinction affects only the procedure that a creditor in the plaintiffs' position has to follow. On either basis, there would be a complete cause of action without there having been an order by this Court, and procedural mechanisms exist to enable proceedings to be served so as to interrupt prescription.

[78] *President of the Republic of South Africa v South African Rugby Football Union* [1998] ZACC 21; 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) at para 25; *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) (*Von Abo*) at paras 31-3.

[79] See, eg, *Von Abo* id at para 35, referencing *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at paras 25-6; *Daniel v President of the Republic of South Africa* [2013] ZACC 24; 2013 (11) BCLR 1241 (CC) at para 12. See also the minority judgment in *Mazibuko v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at para 125 (the majority did not find it necessary to decide the question of exclusive jurisdiction). Examples established by our case law include Parliament's failure to comply with its express constitutional obligation to facilitate public participation in the enactment of legislation and its failure to enact national legislation which the Constitution specifically requires it to enact.

[97] If the case were governed by our confirmatory jurisdiction, a creditor in the plaintiffs' position could issue summons in the High Court, asking the High Court to find, among other things, that the President acted unconstitutionally. If the High Court imposed delictual liability on this basis, one component of its finding would – on the plaintiffs' first premise, the correctness of which I have assumed – require confirmation by this Court. The issuing of summons would not, however, be premature. The need for confirmation on one aspect would not detract from the completeness of the cause of action when summons was issued.

[98] If the case were governed by our exclusive jurisdiction, there would be two options open to a creditor in the plaintiffs' position. The creditor could simultaneously issue summons in the High Court and an application in this Court. The summons would refer to the parallel application in this Court and perhaps seek a stay of the summons pending this Court's decision. Alternatively, the creditor could start by just issuing an application in this Court, as a first step in proceedings for the recovery of delictual damages, in line with *Allianz*,[80] followed afterwards by a High Court summons as the second step in those proceedings. The fact that part of the case was within the exclusive jurisdiction of this Court would not mean that there was not a complete delictual cause of action from the outset. It would mean only that one component of the cause of action has to be decided by this Court while the other components of the cause of action must be decided by the High Court.

[99] In the present case, the matter falls within this Court's confirmatory jurisdiction, not its exclusive jurisdiction. The LSSA launched its application in the High Court. The intervening applicants intervened in the High Court proceedings. The case was thus dealt with by the litigants as not being in this Court's exclusive jurisdiction. The matter then came to this Court for confirmation in terms of section 172(2)(a). Although there is no indication that the basis of jurisdiction was debated, this Court regarded the

[80] *Allianz* above n 58.

case as properly before it for confirmation, stating that the High Court's declarations of constitutional invalidity were "on all fours with the provisions of section 167(5) of the Constitution".[81]

[100] This view accords with the trends of this Court's jurisprudence. The plaintiffs allege that the President's conduct violated the SADC Treaty and the rule of law. The fact that the SADC Treaty creates a policy-making body comprising Heads of States and Governments does not mean that the duties imposed by the Treaty on Summit members are duties imposed by our Constitution on the President. Furthermore, the Treaty allows Heads of States and Governments to make decisions; it does not impose specific obligations.

[101] Section 231 of the Constitution states that negotiating and signing international agreements is the responsibility of the "national executive" and that such agreements bind "the Republic" after they have been approved by Parliament. No obligations in that regard are imposed specifically on the President. Exclusive jurisdiction is likewise not engaged where the President is said to have exercised some or other power in a manner which conflicts with constitutional principles, such as the rule of law, binding on all persons vested with public power.

[102] For these reasons, and subject to actual or constructive knowledge, the debts which are the subject of the action fell "due" within the meaning of the relevant statutory provisions by not later than 18 August 2014.

Actual or constructive knowledge

[103] In their founding affidavit, the plaintiffs anticipated prescription as a component of the requirements for condonation in terms of section 3(4). Since their summons was issued and served in April 2019, they needed to establish that prescription did not start running before April 2016. They did so by asserting that the LSSA's application was

[81] *Law Society* above n 29 at para 19.

instituted on 19 March 2015 and that this Court delivered its judgment on 11 December 2018. They contended that prescription was either stayed for the full duration of the LSSA application or did not start running until this Court delivered judgment. They did not assert that they only acquired knowledge of the relevant facts after April 2016.

[104] In the answering affidavit, the defendants submitted that the debts, as pleaded, fell due on 18 August 2014 and that it appeared from Mr Tembani's affidavit in the intervention application that the plaintiffs became aware of the relevant facts in August 2014 and in any event by not later than 21 July 2015. Mr Tembani's affidavit in support of intervention was attached to the defendants' answering affidavit. The defendants highlighted and addressed the two limited grounds on which the plaintiffs relied to avoid prescription.

[105] In their replying affidavit, the plaintiffs did not respond to the allegation that they had the requisite knowledge by not later than 21 July 2015. Instead, they persisted with the two grounds raised in their founding affidavit. It may be accepted that the defendants bore the onus of establishing that the debts had prescribed.[82] However, given the issues identified in the affidavits, the defendants established that the plaintiffs had the requisite knowledge by July 2015.

Conclusion thus far on prescription

[106] It follows that, subject to the plaintiffs' alternative contention of interruption, the debts were prescribed and the High Court should thus have dismissed the application for condonation.

[82] This is the usual position. The defendants did not argue that section 3(4)(b)(i) of the Institution Act reversed the usual onus.

Interruption of prescription

[107] Although a debtor bears the onus of proving when a debt fell due and when prescription started to run, the creditor bears the burden of proving a subsequent act of interruption.[83]

[108] In their affidavits in the condonation application, the plaintiffs did not assert that the delivery of the intervention application was an act of interruption. Their contention was that the running of prescription was "stayed" from 19 March 2015 (when the LSSA instituted its application) until 11 December 2018 (when this Court delivered judgment), alternatively that prescription did not start to run until 11 December 2018. Even from the written argument, it is unclear whether the plaintiffs rely on the service of the intervention application as an act of interruption. However, since that point was anticipated by the defendants, I shall address it.

[109] As to the "staying" of prescription, the plaintiffs did not contend that the *Law Society* application had the effect of delaying the completion of prescription on any of the grounds set out in section 13(1) of the Prescription Act. Since I have rejected the plaintiffs' contention that prescription did not start to run until this Court delivered its judgment in *Law Society*, the only remaining issue is whether prescription was interrupted when the LSSA served its application in March 2015 or when some of the plaintiffs served their intervention application in July 2015.

[110] The service of the LSSA's application in March 2015 could not, by any stretch, be treated as an act of interruption in favour of the plaintiffs. Section 15(1) requires the process to be one by which the "creditor" claims payment of the debt in question. The plaintiffs were not parties to the institution of the LSSA's application in March 2015. And the LSSA was not a creditor in respect of delictual damages.

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[83] *Anglorand Securities Ltd v Mudau* [2011] ZASCA 76 at para 16; *Cameron-Down v En Commandite Partnership PJ Laubscher And MC Cameron-Dow* [2015] ZAWCHC 48; [2015] 9 BLLR 958 (WCC); (2015) 36 ILJ 3086 (WCC) at para 122.

[111] As to the intervention application, the intervening applicants' notice of motion does not form part of the record in the present case. This is perhaps because the plaintiffs did not contend that service of the intervention application was an act of interruption. From the intervening applicants' founding affidavit in the intervention application, one can infer that they intervened in order to support the relief claimed by the LSSA. The LSSA's notice of motion is also not part of the record in the present case, but according to the judgments given in *Law Society*, the LSSA claimed an order that the President's participation in suspending the Tribunal and his subsequent signing of the 2014 Protocol be declared unconstitutional.

[112] Only five of the plaintiffs were among the intervening applicants.[84] Even if the service of the intervention application was a process by which the intervening applicants claimed payment of the debts which they individually claimed in the subsequent action, such service would only have interrupted prescription in respect of those five plaintiffs. The intervention application could not be viewed as a process by which any of the non-intervening plaintiffs claimed payment of the debts which they individually claimed in the subsequent action.

[113] In respect of the five intervening plaintiffs, the intervention application was not, in my view, a process by which they claimed payment of the debts which are the subject of the pending action. The plaintiffs invoke *Allianz*.[85] It was held in that case that a process claiming only partial relief in respect of a debt could constitute an act of interruption, even though a second separate process was needed in order to obtain an executable judgment in respect of the debt. *Allianz* is, however, distinguishable.

[114] In *Allianz* the creditors were the insured parties in terms of insurance policies issued by the debtor, an insurer. In the first legal process, the creditors sought an order declaring that the debtor was liable to indemnify them under the policies. This

[84] One of those plaintiffs, Mr Tembani, died after the institution of the action. His executor was not substituted in the proceedings before us.

[85] *Allianz* above n 58.

declaratory order would not have given rise to an executable judgment, since it did not require the debtor to do anything. It would, however, settle the question of the insurer's liability and pave the way for a second legal process quantifying the indemnities and claiming a monetary amount. The Court held that in these particular circumstances the obtaining of an executable judgment in the second process would, for purposes of section 15(2), amount to the successful prosecution of the claim commenced by way of the first process.

[115] The correctness of *Allianz* was not questioned in argument before us and it was endorsed by this Court in *Pieman's Pantry*.[86] However, *Allianz* is not authority for the unqualified proposition that a first process which disposes of an issue which is also an issue in a second process interrupts prescription in respect of the debt which is the subject of the second process. In order to interrupt prescription in terms of *Allianz*, the first process must, in terms of section 15(1), be a process capable of being classified as one "whereby the creditor claims payment of the debt". In other words, the process must be identifiable as the first step in the recovery of the debt which forms the subject of the second process.

[116] This requirement was met in *Allianz*. The Court stated that "right" and "debt" are "opposite poles of one and the same obligation".[87] When the insured parties launched the first process, they were asserting their "right" to be indemnified under the policies. Although the "debt" (the monetary amount which the insurer was obliged to pay them) was not yet claimed, the first process was unmistakably a step in claiming that debt and the cause of action in the two processes would be the same.[88]

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[86] *Pieman's Pantry* above n 76 at para 202. What *Allianz* does not address is when prescription starts to run again after the service of the first process. In terms of section 15(4), prescription only starts to run afresh when a judgment under the relevant process becomes executable. Since a declaratory order of the kind obtained in *Allianz* pursuant to the first process is not an executable judgment, prescription would not on the face of it start to run afresh when judgment is given on the first process. However, if prescription does not start to run afresh at that point, the creditor would not be subject to any time limit in instituting the second process.

[87] *Allianz* above n 58 at 331C.

[88] Id at 332J-333D.

[117] The same is true of *Pieman's Pantry*. The referral of the unfair dismissal claim to conciliation was a first and necessary step in obtaining final relief in respect of unfair dismissal, even though such relief required a further process. The unfair dismissal claim referred to conciliation was indisputably the same unfair dismissal claim that was the subject of the subsequent litigation.

[118] In the present matter, the intervention application does not meet the standard of a process by which the plaintiffs in question were claiming payment of the debts they sought to enforce in the subsequent action. The founding affidavit in support of intervention made no reference to delictual liability. The other papers in the intervention application are not part of the record in the present case. If there was anything in them to support the notion that they were a first step in enforcing delictual liability, it was for the plaintiffs – on whom the onus of proving interruption rested – to put them up as part of their papers in the condonation application.

[119] In the condonation application, the intervening applicants did not state that the intervention application was seen by them as a first step in claiming payment of any delictual debts. For all we know, the idea of instituting delictual claims only occurred to the plaintiffs and their legal advisers much later. On their own terms, the LSSA's application and the plaintiffs' intervention advanced only a public law cause of action in support of public law relief. There was nothing in that application to suggest to the President that he was the subject of any delictual claim and that the intervening applicants were intervening in order to obtain relief that would serve as a first step in pursuing delictual claims. Such a purpose, if disclosed, might have affected the High Court's decision to allow the intervening applicants to intervene.

[120] It follows that in *Lisse*[89] the Namibian Supreme Court stretched the *Allianz* principle beyond its proper limits. In the Namibian case, Dr Lisse brought an application to review the Minister of Health's decision to refuse him permission to

[89] *Lisse* above n 63.

practise privately at state hospitals. The review succeeded in the High Court. The Supreme Court dismissed the Minister's appeal in November 2005. As a result, a certificate allowing Dr Lisse to practise was issued in January 2006. In November 2008, he issued summons against the Minister, claiming delictual damages for the loss he had suffered due to his inability to practise at state hospitals over the period April 2004 to December 2005.

[121] The High Court upheld the Minister's special plea of prescription,[90] but this was reversed by the Supreme Court. The first question, according to the Supreme Court, was whether the basis of the claim in the review proceedings was substantially the same as the basis of the claim in the delictual action. The Supreme Court answered this question in the affirmative, stating that in both proceedings relief was claimed on the basis of a breach of the constitutional right to administrative justice.

[122] The second question, the Supreme Court said, was whether the review proceedings constituted a step in the enforcement of the claim for payment of the debt. The Supreme Court noted that Dr Lisse's first priority in the review was to set aside the refusal of permission to practise and obtain an order requiring the Minister to issue the necessary authorisation to him. Until that occurred, he was not able to practise at all in state hospitals. The review proceedings "thus constituted a crucial step in the process of enforcing his constitutional rights". The third question was whether the review disposed of any elements of the claim in the delictual action. The unlawfulness of the Minister's decision was such an element, the Court found, even though on its own it did not establish delictual wrongfulness.

[123] In my view, the first two questions posed by the Namibian Supreme Court were answered incorrectly. If by "basis of the claim" the Court meant the cause of action or right of action, the cause or right of action in the review was not substantially the same as the cause or right of action in the action. The fact that there is some overlap in the

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[90] *Lisse v Ministry of Health and Social Services* [2011] NAHC 248.

elements of causes or rights of action does not mean that they are substantially the same. For example, a cause of action for damages for wrongful arrest and detention is distinct from a cause of action for malicious prosecution, even though they arise from the same set of facts.[91] A claim for damages for personal injury caused in a motor accident and a claim for damages for loss of support due to the death of a breadwinner in the same motor accident are distinct causes of action, even though there is a measure of overlap, with the result that a summons claiming damages of the former kind does not interrupt prescription in respect of damages of the latter kind.[92]

[124] The differences between a public law claim in review proceedings and a private law claim for delictual damages are substantially greater than in the above examples. A violation of the Constitution is of the essence where an applicant claims constitutional relief for an alleged violation of the Constitution by the President. In a delictual claim against the President, the plaintiff must establish that the President acted wrongfully in the delictual sense. A breach of the Constitution may or may not be an element of establishing wrongfulness; it is not an element of the cause of action as such. Fault, causation and damage are not elements of a public law cause of action.

[125] I also disagree with the Namibian Supreme Court's answer to the second question which it posed. While the review judgment may have been useful to Dr Lisse in his delictual claim, the reported judgment does not suggest that there was anything in the review which identified it as a first step in recovering a delictual debt. On the contrary, the Court's judgment suggests that the review was directed only at enabling Dr Lisse to practise at state hospitals. As in the present case, the delictual claim may have been conceived only after the review was finalised.

[126] There is one final consideration relevant to the question of interruption. The case for interruption has to proceed on the basis that the LSSA application and the

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[91] *Olesitse N.O. v Minister of Police* [2023] ZACC 35; 2024 (2) BCLR 238 (CC) at para 64.

[92] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838C-842H.

intervention in that application were the first stage of legal proceedings for the recovery of the delictual debts. If that was the character of the intervention, it would need to have been preceded by a notice in terms of section 3 of the Institution Act. The fact that no such notice was given at that time is consistent with the view that intervention in the LSSA's application was never understood by the relevant plaintiffs as the first step in the recovery of delictual damages.

Conclusion

[127] It follows that the High Court should have dismissed the condonation application on the basis that the debts in question were prescribed. This being so, it is unnecessary to consider the exception. The exception presumes that an action was permissibly instituted.

[128] Although the plaintiffs' action is delictual, there is a sufficient constitutional component in my view to justify granting them protection from costs in terms of *Biowatch*.[93] The proceedings were not frivolous or otherwise manifestly inappropriate. One cannot but feel sympathy for the treatment to which they were allegedly subjected in Zimbabwe.

Order

[129] The following order is made:

1. Leave to appeal is granted.
2. The appeal succeeds.
3. The orders of the High Court and Supreme Court of Appeal are set aside.
4. The High Court's order is replaced with the following order:

   "(a) The plaintiffs' application for condonation is dismissed.

   (b) Consequently, the plaintiffs' action is dismissed."

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[93] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

5. The parties shall bear their own costs in the High Court, the Supreme Court of Appeal and this Court.

For the Applicants:	G Marcus SC, A Coutsoudis and H Rajah Instructed by the State Attorney, Pretoria
For the Respondents:	J J Gauntlett SC, F B Pelser and K Thabakgale Instructed by Hurter Spies Incorporated