THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 167/2021

In the matter between:

LUKE M TEMBANI	**FIRST APPELLANT**
LMT ESTATES (PVT) LTD	**SECOND APPELLANT**
WYNAND HART	**THIRD APPELLANT**
QUEENSDALE ENTERPRISES (PVT) LTD	**FOURTH APPELLANT**
MADODA ENTERPRISES (PVT) LTD	**FIFTH APPELLANT**
KLIPDRIFT ENTERPRISES (PVT) LTD	**SIXTH APPELLANT**
MIKE CAMPBELL (PVT) LTD	**SEVENTH APPELLANT**
RICHARD THOMAS ETHERIDGE	**EIGHTH APPELLANT**
ANDREW KOCKOTT	**NINTH APPELLANT**
TENGWE ESTATES (PVT) LTD	**TENTH APPELLANT**
CHRISTOPHER MELLISH JARRETT	**ELEVENTH APPELLANT**
STUNULA RANCHING (PVT) LTD	**TWELFTH APPELLANT**
LUCHABI RANCH (PVT) LTD	**THIRTEENTH APPELLANT**
LARRY CUMMING	**FOURTEENTH APPELLANT**

FRANCE FARM (PVT) LTD	**FIFTEENTH APPELLANT**
MICHAEL IAN PATRICK ODENDAAL	**SIXTEENTH APPELLANT**
DEBORAH LOUISE ODENDAAL	**SEVENTEENTH APPELLANT**
GRASSFLATS FARM (PVT) LTD	**EIGHTEENTH APPELLANT**
MURIK MARKETING (PVT) LTD	**NINETEENTH APPELLANT**
GIDEON STEPHANUS THERON	**TWENTIETH APPELLANT**
EBEN HAESER (PVT) LTD	**TWENTY-FIRST APPELLANT**
EDEN FARM (PVT) LTD	**TWENTY-SECOND APPELLANT**
PETER HENNING	**TWENTY-THIRD APPELLANT**
CHIREDZI RANCHING (PVT) LTD	**TWENTY-FOURTH APPELLANT**
BATALEURS PEAK FARM HOLDINGS (PVT) LTD	**TWENTY-FIFTH APPELLANT**

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**FIRST RESPONDENT/ CROSS-APPELLANT**
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**SECOND RESPONDENT/ CROSS-APPELLANT**

Neutral citation: *Luke M Tembani and Others v President of the Republic of South Africa and Another* (Case no 167/2021) [2022] ZASCA 70 (20 May 2022)

Coram: PONNAN and MOLEMELA JJA and MUSI, MEYER and PHATSHOANE AJJA

Heard: 5 May 2022

Delivered: 20 May 2022.

Summary: Exception – delictual claim – whether high court correct in upholding exception based on causation – whether exception proceedings appropriate to decide the factual and legal issues raised – appealability – dismissal of an exception not appealable – conclusion that ‘no order is required to be made’ in a conditional application not an appealable order.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van Oosten J, sitting as court of first instance):

(1) The appeal is upheld, and the cross-appeal is struck from the roll, in each instance with costs, including those of two counsel.

(2) The order of the court below is set aside and replaced with the following:
'The defendants' exception to the plaintiffs' second amended particulars of claim dated 18 March 2020 is dismissed with costs, including those of two counsel.'

JUDGMENT

Ponnan JA (Molemela JA and Musi, Meyer and Phatshoane AJJA concurring)

[1] To facilitate what has been described as an ambitious land and agrarian reform programme, the Constitution of the Republic of Zimbabwe was amended to provide for land expropriation without compensation, as also, to remove the jurisdiction of the domestic courts of Zimbabwe over disputes relating to expropriation without compensation.[1] Some farmers, including South African citizens, who had lost their land in consequence of the implementation of the programme, turned to the Southern African Development Community (SADC) Tribunal (the Tribunal). The Tribunal held that the jurisdiction of the Zimbabwean courts had been ousted 'from any case related to the acquisition of agricultural land and that the applicants [in that matter] were therefore unable to

[1] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) para 10.

institute proceedings under the domestic jurisdiction'.[2] It concluded that Zimbabwe was in breach of certain of its obligations under the SADC Treaty (the Treaty)[3] and, inter alia, ordered it to pay fair compensation. Zimbabwe, however, failed to comply with the order of the Tribunal.

[2] In September 2009, at a meeting of the Summit (being the supreme executive body constituted by the Treaty and comprising the Heads of State of the member states of SADC) held in Kinshasa in the Democratic Republic of Congo, Zimbabwe's failure to comply with the decisions of the Tribunal was raised. It was resolved to ask the Committee of Ministers of Justice and Attorneys-General (the Committee) to hold a meeting on the legal issues regarding Zimbabwe and to advise the Summit. The Committee was also asked to 'review the roles, responsibilities and terms of reference of the Tribunal'.

[3] At a meeting of Heads of State and Government, held in Windhoek, Namibia on 16 and 17 August 2010, further 'acts of non-compliance by the Republic of Zimbabwe with regard to the Tribunal's earlier decisions' arose for discussion. The Summit resolved not to re-appoint, for another five-year term, members of the Tribunal, whose term of office expired in August 2010, pending the report from the Committee. In May 2011, it was decided, in effect, to suspend the operations of the Tribunal by neither re-appointing Members of the Tribunal, whose term of office had expired in 2010, nor replacing those whose term would expire in 2011.[4] In the result, the Tribunal was effectively disabled and unable to function.

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[2] See *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* [2008] SADCT 2.

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

[4] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZAGPPHC 4; [2018] 2 All SA 806 (GP); 2018 (6) BCLR 695 (GP) para 20.

[4] Thereafter, on 18 August 2014 and at Victoria Falls, Zimbabwe, the Summit adopted a new Protocol (the 2014 Protocol). The 2014 Protocol abolished access by all private individuals to the Tribunal. Thus, instead of facilitating enforcement of the Tribunal's decisions, the Summit chose to disregard the binding Treaty obligations of member states. It treated the relevant Treaty provisions and the Tribunal decisions as non-existent and also violated the undertaking to support and promote the Tribunal, whose decisions are supposed to bind member states and, by extension, the Summit.

[5] The appellants are all private individuals, who had claims arising, in each instance, from the dispossession by the Government of Zimbabwe (contrary to the Treaty and International Law) of farms owned, registered or worked by each of them. Those claims would have been justiciable before the Tribunal, prior to the adoption of the 2014 Protocol.

[6] The then South African President's negotiation and signing of the 2014 Protocol was subsequently challenged in litigation on the grounds that it was unconstitutional, unlawful and irrational. So too, his decision to make common cause with his peers to not appoint or re-appoint (as the case may be) Members or Judges to the Tribunal and to suspend the operations of the latter. The application was launched by the Law Society of South Africa (the LSSA) on 19 March 2015. Some of the current appellants applied for leave to intervene in the application. Both the intervention application and the review application succeeded. A Full Court of the Gauteng Division of the High Court, Pretoria (the full court), sitting as a court of first instance (by virtue of the importance of the matter), declared on 1 March 2018 that the President's participation in suspending the operations of the SADC Tribunal and his subsequent signing of the 2014 Protocol was unlawful, irrational and thus, unconstitutional. In terms

of s 172(2)*(a)* of the Constitution, the full court referred its order to the Constitutional Court for confirmation.[5]

[7] In a judgment delivered on 11 December 2018, the Constitutional Court confirmed the full court's declaration of unconstitutionality.[6] In arriving at that conclusion, the Constitutional Court held:

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

[45] 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.'

[8] Three days after the Constitutional Court handed down its judgment in the matter, the attorney for the appellants served a notice in terms of s 3(1)*(a)* of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act) on the State Attorney, pursuant to which ten of the appellants gave notice of their intention to institute claims for damages against the President of the Republic of South Africa and the Government of the Republic

[5] Ibid para 72.

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

of South Africa (the respondents).[7] The response to the notice from the State Attorney on behalf of the respondents was:

'. . . the President does not acknowledge or admit your clients' claims.

In response to paragraph 5 of the Notice, the president does contend that the Notice has not been sent within the period prescribed in the act and accordingly intends relying on the failure to serve the notice timeously.'

[9] On 15 January 2019, the appellants' attorney served what was described as a 'supplementary notice in terms of section 3(1)*(a)*' to, as it was put, 'clarify, and in certain respects, correct our letter of 14 December 2018'. The supplementary notice made reference to all 25 of the appellants as well as the various amounts claimed by each. On 18 January 2019, the State Attorney reiterated that the appellants' claims were not admitted and that the notice and supplementary notice had not been sent within the period prescribed in the Act.

[10] On 9 April 2019, the appellants issued and served: (i) a conditional condonation application, seeking, to the extent necessary, that any non-compliance on their part with the provisions of s 3 of the Act, be condoned; and (ii) a summons and particulars of claim. The respondents chose to meet the particulars of claim by raising multiple exceptions. Although the particulars of claim was subsequently amended, the respondents filed yet a further notice of exception and also opposed the appellants' conditional condonation application, in the main, on the basis that the claims had prescribed. Consequently, the exceptions and conditional condonation application were enrolled for hearing on the same day before Van Oosten J in the Gauteng Division of the High Court, Pretoria (the high court)

[7] Section 3 of the Legal Proceedings Against Certain Organs of State Act provides:

'(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

(b) the organ of state in question has consented in writing to the institution of that legal proceedings-

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).'

[11] On 18 December 2020 the high court issued the following order:

'1. Exception 1 (the factual causation exception) is upheld.

2. Exception 1 (the legal causation exception) is upheld in respect of the 1st, 2nd, 4th, 5th, 6th, 7th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 18th, 19th, 21st, 22nd, 24th, and 25th plaintiffs' claims.

3. Exception 2 (the legal duty exception), exception 4 (the domestic remedies exception) and exception 5 (the pain and suffering exception) are dismissed.

4. No order is made on exception 3 (the second plaintiff's claim exception).

5. No order is made as to the costs of the condonation application and the exception.

6. Leave is granted to the plaintiffs to amend their particulars of claim by Notice of Amendment to be delivered on or before 29 January 2021.'

[12] The appellants applied for leave to appeal against paragraphs 1, 2 and 5 of the order of Van Oosten J. The respondents sought leave: (a) 'only to the extent that the court failed to grant an order dismissing the [appellants'] condonation application and paragraph 5 of the order only in respect of the costs of the [appellants'] condonation application; and (b) conditionally against paragraph 3 of the order 'only in respect of the dismissal of Exception 2 (the legal duty exception) in the event that the [appellants'] are granted leave to appeal against paragraphs 1 and/or 2 of the order'.

[13] The high court granted leave to appeal to this Court in the following terms:

'1. The plaintiffs are granted leave to appeal to the Supreme Court of Appeal against paragraphs 1 and 2 of the order delivered by the Honourable Mr Justice Van Oosten on 18 December 2020 (the order);

2. The defendants are granted leave to appeal to the Supreme Court of Appeal against paragraph 3 of the order, only in respect of the dismissal of Exception 2 (the legal duty exception);

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.
6. The costs of the plaintiffs' and defendants' applications for leave to appeal shall be costs in the appeal.'

[14] Whilst exceptions provide a useful mechanism 'to weed out cases without legal merit', it is nonetheless necessary that they be dealt with sensibly.[8] It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent.[9] The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable.[10] The test is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.[11]

[15] In *H v Fetal Assessment Centre*, the Constitutional Court recognised that there may be occasions when 'the question of the development of the common

[8] *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 3.
[9] Cilliers *et al Herbstein & Van Winsen The Practice of the High Courts of South Africa* 5ed Vol 1 at 631; *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 899E-F.
[10] *Ocean Echo Properties 327 CC and Another v Old Mutual Life Insurance Company (South Africa) Ltd* [2018] ZASCA 9; 2018 (3) SA 405 (SCA) para 9.
[11] *Trustees for the Time Being of the Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) para 36 (*Children's Resource Centre Trust*).

law would be better served after hearing all the evidence'.[12] Whilst there is no general rule that issues relating to the development of the common law cannot be decided on exception, however, where the 'factual situation is complex and the legal position uncertain', it will normally be better not to do so.[13] In this regard reference was made to the Australian case of *Harriton v Stephens*, where Kirby J (in dissent) observed:

'Especially in novel claims asserting new legal obligations, the applicable common law tends to grow out of a full understanding of the facts. To decide the present appeal on abbreviated agreed facts risks inflicting an injustice on the appellant because the colour and content of the obligations relied on may not be proved with sufficient force because of the brevity of the factual premises upon which the claim must be built. Where the law is grappling with a new problem, or is in a state of transition, the facts will often "help to throw light on the existence of a legal cause of action – specifically a duty of care[14] owed by the defendant to the plaintiff". Facts may present wrongs. Wrongs often cry out for a remedy. To their cry the common law may not be indifferent.'[15]

[16] This approach ensures compliance with s 39(2) of the Constitution, which requires courts to develop the common law by promoting the spirit, purport and objects of the Bill of Rights, inasmuch as it places a court in a position to make

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12 *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) BCLR 127 (CC); 2015 (2) SA 193 (CC) para 11 (*H v Fetal Assessment Centre*).

13 In *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938(CC); 2001 (1) BCLR 995 (CC) para 80 the Constitutional Court held, as with some cases on exception, it was also better not to decide issues about the development of the common law by an order granting absolution from the instance at the end of a plaintiff's case in a trial. It stated:

'There may be cases where there is clearly no merit in the submission that the common law should be developed to provide relief to the plaintiff. In such circumstances absolution should be granted. But where the factual situation is complex and the legal position uncertain, the interests of justice will often better be served by the exercise of the discretion that the trial Judge has to refuse absolution. If this is done, the facts on which the decision has to be made can be determined after hearing all the evidence, and the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors.'

14 It bears mention, as was pointed out in *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* ZASCA 77; [2017] 3 All SA 382 (SCA); 2018 (1) SA 391 (SCA) para 25, that:

'. . . in English law ''duty of care'' is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in *Trustees, Two Oceans Aquarium Trust* at 144F, ''duty of care'' in English law ''straddles both elements of wrongfulness and negligence''. Accordingly, the phrase ''duty of care'' in our legal setting is inherently misleading.' (Footnotes Omitted.)

15 *Harriton v Stephens* [2006] HCA 15; (2006) 226 CLR 52; (2006) 226 ALR 391 para 35.

a final decision 'after hearing all the evidence, and the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors'.[16] It is thus only if the court can conclude that it is impossible to recognize the claim, irrespective of the facts as they might emerge at the trial, that the exception can and should be upheld.[17] Hence, courts must assess the various arguments for and against the recognition of what may be perceived as a novel claim and in doing so the normative matrix of the Constitution and the Bill of Rights must be applied for the purposes of determining whether the claim may be recognised in law.[18]

[17] Indeed, as accepted in *H v Fetal Assessment Centre*:

'Even if the conclusion is reached that the limits of our law of delict will be stretched beyond recognition for harm of this kind to be recognised within its niche, our Constitution gives our courts the liberty to develop motivated exceptions to common law rules or even recognise new remedies for infringement of rights.'[19]

On this basis, the Constitutional Court held that the novel claim under consideration in that case 'is not necessarily inconceivable under our law'.[20]

[18] In *Pretorius and Another v Transport Pension Fund and Another,*[21] the Constitutional Court reiterated that exception proceedings are inappropriate to decide the complex factual and legal issues raised by the objections advanced there. As was the case with *H v Fetal Assessment Centre*, the *Pretorius* matter involved a 'factual situation [that] is complex and the legal position uncertain'.[22] *Pretorius* held that 'to decide the possible unconscionableness of state conduct,

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[16] *H v Fetal Assessment Centre* fn 12 above para 14, with reference to *Carmichele v Minister of Safety and Security* (fn 13 above) para 21.
[17] *H v Fetal Assessment Centre* para 26.
[18] *H v Fetal Assessment Centre* para 42.
[19] *H v Fetal Assessment Centre* para 66.
[20] Ibid.
[21] *Pretorius and Another v Transport Pension Fund and Another* [2018] ZACC 10; [2018] 7 BLLR 633 (CC); 2018 (7) BCLR 838 (CC); (2018) 39 ILJ 1937 (CC); 2019 (2) SA 37 (CC) para 42 (*Pretorius*).
[22] *Pretorius* para 53. See also *Fetal Assessment Centre* fn 12 above paras 11-2, relying on C*armichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (1) BCLR 995 (CC).

it will be better to get the full story thrashed out at a trial',[23] and there is more than enough legal uncertainty to send the claim to trial.[24] The Constitutional Court accordingly concluded that the high court should have dismissed the exception.

[19] *H v Fetal Assessment Centre* also confirmed the judgment of this Court in *Children's Resource Centre Trust* that if a novel or unprecedented claim is 'legally plausible' then it 'must be determined in the course of the action'.[25] *Children's Resource Centre Trust* was concerned with a delictual claim based on a novel legal duty not to act negligently. As was explained 'the existence of such a duty depends on the facts of the case and a range of policy issues', which required the Court to be 'fully informed in regard to the policy elements' and therefore 'the enquiry militates against that decision being taken without evidence'. This, so it was held, renders it impossible to arrive at a conclusion except upon a consideration of *all* the circumstances of the case and every other relevant factor.[26]

[20] Accordingly, a court must be satisfied that a novel claim is necessarily inconceivable under our law as potentially developed under s 39(2) of the Constitution before it can uphold an exception premised on the alleged non-disclosure of a cause of action. Citing *H v Fetal Assessment Centre*, the Constitutional Court held in *Pretorius* that the dismissal of an exception does not deprive the respondents of the opportunity of raising the same defences as substantive defences in their respective pleas and for their merits to be determined after the leading of evidence at the trial, which is probably, in any event, a better way to determine the potentially complex factual and legal issues

[23] *Pretorius* para 44.
[24] *Pretorius* para 53.
[25] *Children's Resource Centre Trust* para 37.
[26] Ibid; *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318 E-I; *Axiam Holdings Ltd v Deloitte & Touche* 2006 (1) SA 237; [2005] 4 All SA 157 (SCA) para 25.

involved.[27] This case indeed involves, as was expressly conceded on behalf of the respondents, 'an unprecedented and novel delictual claim'.

[21] The high court appears to have construed a *single* exception, explicitly premised on an alleged failure to plead that the defendants are the 'cause' of the plaintiffs' losses, as forming *two* separate exceptions. One strand relates to what was explicitly described in the judgment as 'factual causation' and the other as 'legal causation'. In that, the high court appeared to have confused the enquiry. A contention regarding the cause (as opposed to the 'remoteness') of loss relates to factual - as opposed to legal - causation. The exception invoked only the former. It was accordingly not open to the high court to enter into the question of legal causation. As this Court has confirmed, '[a]n excipient is obliged to confine his complaint to the stated grounds of his exception.'[28]

[22] The high court did not properly analyse any of the seven multitier issues raised in the exception. It referred only to three, but without conducting a thorough analysis of any or even considering whether the criticisms, such as they were, indeed satisfied the applicable legal test for exceptions. In that regard, the high court reasoned:

'[34] The complaint raised by the defendants is multitiered. First, that the plaintiffs do not allege that the President's signature of the 2014 Protocol brought it into force, nor so it was argued, could they, as the 2014 Protocol only would have become binding and come into force on signature of the requisite number of member states (two thirds of the Summit members) and the further requirement of ratification by those states, which, as was accepted by the Constitutional Court in *Law Society*, none of the states had complied with. Second, the Constitutional Court in *Law Society* ordered the President to withdraw his signature from the 2014 Protocol (which his successor complied with). Third, it is alleged that the President himself suspended the SADC Tribunal, he indeed participated in a decision by the SADC

[27] *Pretorius* fn 21 above para 22.
[28] *Feldman NO v EMI Music SA (Pty) Ltd/ EMI Music Publishing SA (Pty) Ltd* [2009] ZASCA 75; 2010 (1) SA 1 (SCA); [2009] 4 All SA 307 (SCA) para 7.

Summit, consisting of all the heads of state of the SADC countries, to suspend the Tribunal. Fourth, it is not alleged that the SADC Summit is precluded from lifting the suspension of the SADC Tribunal, and sixth, the plaintiffs do not allege that they have claims against the defendants, but ‘‘claims justiciable by the SADC Tribunal’’ against ‘‘the Government of Zimbabwe’’, and that ‘‘such claims aris[e] in each instance from the dispossession by the Government of Zimbabwe’’, and the alleged conduct of its agents and officials.’

[23] The high court proceeded to hold:

‘[41] Delict requires that the wrongful action be the factual and legal cause of the harm suffered in order to ground an action for damages. In determining factual causation, the ‘‘but for’’ test applies: but for the occurrence of the wrongful conduct, what would have happened? Once factual causation is established, and inquiry into legal causation follows. Here the question is whether the defendant’s conduct is sufficiently closely linked to, or the proximate cause of the harm suffered for legal liability to ensue, or whether the harm is too remote. This inquiry is flexible and assessed in the light of what legal policy, reasonability, fairness and justice require. The test for legal causation is ‘‘a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part’’. . . .

[42] Applying these principles, I am of the view that the facts pleaded, as I have outlined above, for the reasons stated, do not contain sufficient averments to establish a causal or proximate cause between the President’s conduct and the plaintiffs’ alleged damages suffered. The notion that may be inferred from the pleaded facts, that had the President acted constitutionally, he may have been able to prevent the suspension of the Tribunal by blocking consensus, is a non-sequitur. The SADC Treaty, as I have pointed out, allows for the dissolution of the Tribunal by way of majority vote. Therefore, the Presidents opposition or absence of his signature to the 2014 Protocol, would not have made any difference as the Tribunal could still have been dissolved, by a vote by three-quarters of the other heads of State. As correctly pointed out by counsel for the defendants, whatever effect the former President’s signature of the 2014 Protocol (absent ratification) may be said to have, even on the basis of a joint-wrongdoer as contended for by counsel for the plaintiffs, the Constitutional Court’s order that the President must withdraw that signature, which did in fact occur, thwarted the ‘‘conspiracy’’ to curtail the jurisdiction of the Tribunal. Formal ratification of the decision, moreover, in any event, never occurred. Finally, I am unable to

find any allegations pleaded, demonstrating that the action or inaction by only the President of South Africa, being only one member of a body made up of all SADC's heads of state, can be said to be the cause of the suspension of the Tribunal.'

[24] The high court's treatment of the causation exception reveals a conflation of factual and legal causation. Although purporting to deal with factual causation, the analysis, in truth, centres on 'proximate cause' and 'remoteness', 'legal policy', 'reasonability', 'fairness', and case law on legal causation. In the single paragraph comprising the high court's analysis and conclusion on the pleaded issue, the judgment purports to apply 'these' principles, namely those applicable to legal causation. That paragraph then records the 'view' that 'the facts pleaded … do not contain sufficient averments to establish a causal or proximate cause'. Proximate cause relates to legal causation, whilst a causal *nexus* (to complete the inchoate concept in the quotation) relates to factual causation. The high court's discussion of principles applicable to legal causation (and its fragmented reference to factual causation) reveals, with respect, a confused analysis. The upshot of the analysis is the conclusion that the high court was 'unable to find any allegations pleaded, demonstrating that the action or inaction by only the President of South Africa … can be said to be the cause of the suspension of the Tribunal'. In that, the high court appears, as well, to have misconceived the test.[29]

[25] Thus, even on this rather perfunctory analysis, it must follow that, in upholding the factual causation exception, the judgment of the high court cannot be supported. And, as I have sought to show, legal causation did not even arise. Yet, it was entertained. This renders it unnecessary to consider the other points

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29 *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA) para 33; *Lee v Minister of Correctional Services* [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC) paras 47, 55 and 60.

urged upon us in the appeal. As these are proceedings on exception, those, I daresay, are better left to the trial court.

[26] It follows that the appeal against the upholding of the causation exception must succeed. Consequently, paragraphs 1 and 2 of the order of the high court fall to be set aside.

[27] Turning to the respondents' cross-appeal. In *Maize Board v Tiger Oats Ltd* this Court held:

' . . . it now has to be accepted that a dismissal of an exception (save an exception to the jurisdiction of the court), presented and argued as nothing other than an exception, does not finally dispose of the issue raised by the exception and is not appealable. Such acceptance would on the present state of the law and the jurisprudence of this court create certainty and accordingly be in the best interests of litigating parties. If litigating parties wish to obtain a final decision, whichever way the decision of the court goes on an issue raised by an exception, they should make use of the procedure designed for that purpose namely the procedure provided for in Rule 33 and either agree on a special case in terms of that rule or request the court to direct that the issue be finally disposed of in an appropriate manner. If that is done any misunderstanding on the part of any of the parties and any resulting prejudice should be avoided.'[30]

Maize Board has been consistently followed by this Court[31] and it is well-established that this Court will not readily depart from its previous decisions. It follows that the dismissal by the high court of the legal duty exception is not appealable.

[28] That leaves the conditional condonation application: Insofar as that application is concerned, the high court held:

'[25] . . . I conclude that the [appellants] were correct in their stance that no condonation was required on the premise that their cause of action was only complete after delivery of the

[30] *Maize Board v Tiger Oats Ltd and Others* [2002] ZASCA 74; [2002] 3 All SA 593 (A) para 14 (*Maize Board*).
[31] See *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43 para 22 and the cases there cited.

Constitutional Court's judgment . . . The launching of the application for condonation on condition that this finding would not be made, was a wise precautionary decision, which, understandably so, was not criticised.

[26] It follows that no order is required to be made in the application for condonation save for the costs thereof, to which I shall revert.'

[29] First, not having made an order, it is unclear why the high court thereafter saw fit to grant leave to the respondents to appeal to this Court against what it described as 'the order to the extent that the Court did not grant an order dismissing the plaintiffs' condonation application'. On any reckoning no appealable order issued. Hence, no appeal can lie.

[30] Second, as paragraph 4 of the order granting leave to appeal to this Court appears to illustrate, the motivation for the grant of leave, as I discern it, pertains to what may have been said *en passant* by the high court in arriving at the conclusion that 'no order is required to be made'. Paragraph 4, in part, provides 'that the determination of the condonation application by [this Court] will finally determine the issue of whether the plaintiffs' claims have prescribed'. The fallacy in the approach, however, is to assume, wrongly so, that an appeal lies against the reasoning of the court below. It does not. An appeal lies against the substantive order of a court.[32]

[31] Third, whilst it is indeed so that condonation cannot be granted if the debt has already been extinguished by prescription,[33] a special defence such as prescription should ordinarily be raised by way of a special plea. In which event, it would be open to a plaintiff to file a replication to the effect that the claim had not prescribed, inter alia, because in terms of s 12 of the Prescription Act,[34] the debt only became due on a date less than three years prior to the date

[32] *Western Johannesburg Rent Board & another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355.
[33] *Legal Aid Board and Others v Singh* [2008] ZAKZHC 66; 2009 (1) SA 184 (N).
[34] Prescription Act 68 of 1969.

of service of the summons or because prescription had been interrupted in terms of s 15 or because the completion of prescription had been delayed in terms of s 13.[35] The issue could thereafter be dealt with, if so advised, under rule 33, especially rule 33(4).[36]

[32] Fourth (and this is linked to the third), whilst the determination of a condonation application is usually a necessary precursor to the consideration of the main application or action, here the application was both in substance and form, as it was styled, a conditional one. The high court appeared to appreciate as much when it stated:

'[15] The reason for the condonation application being conditional, the plaintiffs contend, is that condonation on a correct understanding of the legal position, does not arise. The condonation application accordingly, was instituted under the Act, merely as a precaution in an attempt to remove, what was referred to as a non-issue, from the arena.'

And yet, it dealt with it, as it were, as if an anterior application that required adjudication up-front. What is more, as I have endeavoured to show, the issue raised therein, namely prescription, neither lent itself to adjudication, nor final determination, on the papers as they stood. In that regard, the appellants made plain in their replying affidavit:

'[55] To the extent that the respondents might attempt to persist in their special plea of prescription (in respect of which, as mentioned, they bear the onus) at the trial, this will be met (to the extent that any *prima facie* case is established) with *viva voce* evidence at the appropriate stage.'

It thus seems to me that the high court would have been better advised not to have entered into the conditional condonation application at this stage of the proceedings.

[33] It follows that as both the dismissal by the high court of the legal duty exception and the conclusion that 'no order is required to be made in the

[35] *Butler v Swain* 1960 (1) SA 527 (N); *Yusaf v Bailey* 1964 (4) SA 117 (W); *Maize Board* fn 30 above para 13.
[36] *De Polo v Dreyer and Others* 1989 (4) SA 1059 (W).

application for condonation' are not appealable, the cross-appeal falls to be struck from the roll.

[34] In the result:

(1) The appeal is upheld, and the cross-appeal is struck from the roll, in each instance with costs, including those of two counsel.

(2) The order of the court below is set aside and replaced with the following:
'The defendants' exception to the plaintiffs' second amended particulars of claim dated 18 March 2020 is dismissed with costs, including those of two counsel.'

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V M Ponnan
Judge of Appeal

APPEARANCES

For the appellants:	J J Gauntlett QC SC (with F B Pelser) Instructed by: Hurter Spies Inc, Pretoria Hendre Conradie Inc, Bloemfontein
For the respondents:	G Marcus SC (with A Coutsoudis) Instructed by: State Attorney, Pretoria State Attorney, Bloemfontein.