



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 1 MARCH 2022

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*Trustees for the time being of the Burmilla Trust and Another v President of the RSA and Another*  
(Case no 64/2021) [2022] ZASCA 22 (1 March 2022)

---

Today the Supreme Court of Appeal (SCA) handed down judgment upholding, with costs including the costs of three counsel, an appeal against the decision of the Gauteng Division of the High Court of South Africa, Pretoria (the high court).

The first appellant, the trustees for the time being of the Burmilla Trust (the Burmilla Trust), and the second appellant, Mr Josias van Zyl, instituted action in the North Gauteng Division of the High Court, Pretoria against the first respondent, the President of the Republic of South Africa in his official capacity as head of state and the second respondent, the Government of the Republic of South Africa, for payment of damages in the total sum of approximately R800 million, as well as interest and costs. In their particulars of claim the appellants put forward various claims. The respondents excepted to the particulars of claim, alleging on 14 grounds that they did not disclose a cause of action in respect of any of the claims. The court a quo (Tuchten J) upheld most of the grounds of exception. Although it did not say so explicitly, the effect of the order was to put an end to each of the claims of the appellants.

The court a quo granted leave to the appellants to appeal to this court. In broad terms the issue on appeal was whether the amended particulars of claim disclosed a cause of action in respect of all or any of the claims.

In their particulars of claim, the appellants claimed payment of the following amounts: (a) R641 109 723 plus interest for the value of the Rampai lease (claim A);(b) R80 million for moral damages allegedly suffered by Mr van Zyl (claim B);(c) R15 004 729 plus interest for legal costs incurred in respect of the SADC claim (claim C);(d) R2 782 554 plus interest for legal costs incurred in respect of the SADC saving application (claim D); and (e) R64 324 672 plus interest for legal costs incurred in respect of the proceedings before the PCA tribunal, the Mauritius tribunal, as well as in the Singapore courts (claim E).

In respect of claim A, the majority judgement of the SCA held that the particulars of claim disclosed a cause of action and therefore, the exception should not have been allowed in respect thereof. Regarding claim B, the Court held that the particulars of claim did not disclose a cause of action in respect of claim B. In respect of claim C the Court held that these costs could have been awarded as constitutional damages in favour of the Burmilla Trust. On this basis the exception against claim C should also have been dismissed. In respect of claim D, the Court held that the exception against claim D was correctly upheld as the appellants did not plead any legal basis for this claim and coming to claim E, the Court found no basis for this claim as well. As a result, the SCA in its majority judgment made the following orders: The appeal of the Burmilla Trust was upheld with costs, including the costs of three counsel. The appeal of Mr van Zyl was dismissed with costs, including the costs of three counsel. The order of the court a quo was set aside and replaced with the following:(a) The exception against the claims of the Burmilla Trust in respect of the value of the Rampai mining lease and the costs of the prosecution

of that claim before the SADC tribunal, was dismissed with costs, including the costs of two counsel;(b) The exception was allowed in respect of all other claims of the Burmilla Trust and they are struck out;(c) The exception was allowed in respect of all the claims of Mr van Zyl and they are struck out with costs, including the costs of two counsel. The appellants may seek to amend their particulars of claim by notice delivered within 30 days of the date of this judgment. The minority would have dismissed the appeal in toto.

Thus, only claim A of the Burmilla Trust and claim B (insofar as it concerned the Burmilla Trust), survive the exception. These claims were for constitutional damages, essentially based on the following averments: the Burmilla Trust had instituted proceedings against Lesotho before the SADC tribunal alleging that property (the Rampai lease) was expropriated without compensation (the SADC claim); the then President of the Republic of South Africa participated in a collusive decision to prevent the prosecution of the SADC claim; this conduct constituted a violation of the rights of the Burmilla Trust under s 34 of the Constitution; and, but for the violation of its rights, the SADC tribunal would have directed Lesotho to compensate it for the value of the Rampai lease and to pay its costs.

The respondents relied on two main contentions. First, that in law the SADC tribunal could not hold that the Rampai lease was valid and expropriated. Second, that claim A was precluded by a previous decision of the SCA in *Van Zyl and Others v Government of the Republic of South Africa (Van Zyl SCA)*. The majority discussed applicable principles of international law and concluded that the SADC tribunal could have found for the Burmilla Trust. The majority also analysed *Van Zyl SCA* and came to the conclusion that it did not bar the present action. The minority would have found for the respondents on both points.

~~~~ends~~~~