THE SUSPENSION OF THE SADC TRIBUNAL

Michelo Hansungule*
Centre for Human Rights, Faculty of Law
University of Pretoria, South Africa;
Commissioner: International Commission of Jurists (ICJ)

1. Introduction

In August 2012 the Summit of the Heads of State and Government of the Southern African Development Community (SADC) held in Maputo, Mozambique, decided to suspend from operation one of its key institutions the SADC Tribunal. As the resolution stated:

> 24. Summit considered the Report of the Committee of Ministers of Justice/Attorneys General and the observations by the Council of Ministers and resolved that a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States.

This unprecedented action followed several months of tit for tat particularly between the Tribunal and Zimbabwe mostly over white commercial farms' invasions by so-called war veterans.

The essence of this decision simply is to oust the jurisdiction of the Tribunal from entertaining alleged human rights violations at the instance of individual victims such as the white commercial farmers from Zimbabwe who besieged the Tribunal complaining about the Zimbabwe government's land grab policy. It made this quite clear with the injunction that "its mandate should be confined to interpretation of the SADC Treaty and protocols relating disputes between Mem-

*The views in this Report are solely those of the author and do not represent the views of the institutions the author works for.

ber States". This is a cowardly response to the victory by Zimbabwe white farmers at the Tribunal based on a law the SADC Member States' themselves adopted apparently for the good of the region.

Civil society tried to fight this draconian decision with all means at their disposal but the Summit would hear none of it. Combining their efforts, the Southern African Litigation Centre, the SADC Lawyers Association as well as the International Commission of Jurists (ICJ) Africa Office, among others, held a series of meetings and workshops to express their displeasure and rejection of the Summit decision. When they were not heard, civil society decided to take the matter to the African Court on Human and Peoples' Rights for Advisory Opinion on the decision of the SADC Summit. The Opinion is still being awaited.

However, following this instruction, the SADC Secretariat convened a meeting of SADC Ministers of Justice Troika in late February 2013. A meeting of the Council of Ministers took place the following week. Surprisingly, the Ministers' meetings were very contentious. Debate was polarised. Their views on the Tribunal were divided. It was not easy for the ministers to reach consensus. Consequently, the Council of Ministers requested that a full meeting of Ministers of Justice meet to prepare the draft Terms of Reference (TORs) for their extended mandate on the review of the Protocol on the Tribunal. The Ministers of Justice are expected to meet some time in June 2013, prior to the next Summit. For now, as far as the Tribunal staff matters are concerned, it appears that the *status quo* will remain.

2. History

The SADC Tribunal is one of the youngest regional courts. But it was an innovation for SADC leaders to agree not only to commit themselves to regional integration but towards respect for the human rights of their citizens. The SADC Treaty explicitly commits SADC Member States to respect human rights, rule of law and good governance which is a first natural priority in most countries. Consequently, the Treaty establishes the SADC Tribunal among its organs with the objective to enforce the treaty obligations among member States.

Article 9 (g) of the SADC Treaty as read with Article 16 of the Treaty establishes the SADC Tribunal. Pursuant to Article 16 of the Treaty, the mandate of the Tribunal is to ensure adherence to the proper interpretation of the provisions of the Treaty and subsidiary

instruments, and to adjudicate upon such disputes as may be referred to the Tribunal. The Tribunal may also tender advisory opinions upon request by Summit or Council of Ministers. Its decisions are final and binding.

2.1 Operationalisation of the Tribunal

Although the SADC Treaty was signed in 1992, the Protocol on the Tribunal was only signed into a legal instrument at a Summit of Heads of State or Government in Windhoek some eight years later on 7 August 2000. The setting up of the Tribunal, took even longer. Summit pursuant to Article 4 (4) of the Protocol on Tribunal only appointed the first Members (Judges) during their Summit held in Botswana on 18 August 2005. The inauguration of the Tribunal and the swearing in of the Members took place on 18 November 2005 in Windhoek, the seat of the Tribunal. The first Members were:

(a) The Hon Rigoberto Kambovo (Angola)
(b) The Hon Dr Onkemetse B Tshosa (Botswana)
(c) The Hon Justice Isaac Jamu Mtambo SC (Malawi)
(d) The Hon Justice Ariranga Govindasamy Pillay (Mauritius)
(e) The Hon Justice Antonio Mondlane (Mozambique)
(f) The Hon Justice Petrus T. Damaseb (Namibia)
(g) The Hon Justice Stanley B. Maphalala (Swaziland)
(h) The Hon Justice Frederick Werema (Tanzania)
(i) The Hon Justice Fredrick Mwela Chomba (Zambia)
(j) The Hon Justice Antonina Guvava (Zimbwabwe)

The first President of the Tribunal was Justice Mondlane from Mozambique (2005–2008) who was followed by Justice Pillay from Mauritius (2008–2011). These judges are nominated and recommended by their governments, State Parties to the SADC Treaty. Amazingly, however, Zimbabwe government officials have bitterly criticised their own Judge Hon Justice Antonina Guvava. In 2006, the Tribunal appointed the Registrar of the Tribunal, Justice M C C Mkandawire from Malawi together with eight other Support Staff. This marked the real operationalisation of the Tribunal because the Tribunal Registry was opened in Windhoek after the swearing — in of the Registrar on 22 November 2006.

Concerning Justice Antonina, it is instructive to mention that a

senior government official in the Zimbabwe government complained at an organised workshop pursuant to the 1965 United Nations Convention on the Elimination on All Forms of Racial Discrimination held in Pretoria that this Judge in particular was too junior to 'overrule' the Supreme Court of Zimbabwe while sitting at the SADC Tribunal. This, apparently desperate move ignored the basic fact that it is the same government and probably the same official that identified and nominated her. As an international body, the SADC Tribunal only calls on Member States to nominate judges who subsequently are subjected to election by the SADC Summit comprising Heads of State and Government.

2.2 Cases

Having opened the Registry in November 2006, the maiden case was received on 27 September 2007 filed by a citizen of Malawi against the SADC Secretariat. This is the celebrated case of *Earnest Francis Mitingwi vs SADC Secretariat (SADC (T) 1/2007).* In this case, Mr Mitingwi complained about his failed appointment to the SADC Secretariat. Though he sat the interviews and got the job, he, however, did not honour his written promise to travel to the SADC Headquarters in Gaborone to take up the job. He explained that he delayed his travel due to the fact that he was slapped with criminal charges of lying in his testimony in a case in court by Malawi officials and had to stay home and attend to the proceedings. He sued the Secretariat because when he tried to press them to start his job, Malawi government wrote the Secretariat urging it not to take him on. Consequently, the Secretariat reversed its decision and withdrew their offer. This was the dispute Mr Mitigwiri took to the Tribunal contending that he was their employee while the Tribunal rejected that and instead demanded damages from him for the losses they incurred after he could not take up their offer. In its maiden judgment, the Tribunal easily dismissed the case on the ground that though there was an offer, the complainant did not take up the job despite his indication that he would. Because the Secretariat is a legal person, it can sue and be sued before the SADC Tribunal. This case was followed by the controversial case of *Mike Campbell (PVT) Ltd and Other vs The Republic of Zimbabwe (SADC (T) 2/2007)* which ultimately led to the suspension of the Tribunal.

Thereafter, the legal flood-gates of the Tribunal opened because the case of Mike Campbell was followed by four other intervener applications which for convenience the Tribunal consolidated into one case. On 11 October 2007, Mike Campbell (Pvt) Limited and William Michael Campbell filed the application with the Tribunal challenging the acquisition by the Respondent of agricultural land known as Mount Carmell in the District of Chegutu in the Republic of Zimbabwe. Simultaneously, they filed an application in terms of Article 28 of the Protocol on Tribunal as read with Rule 61 (2)–(5) of the Rules of Procedure of the SADC Tribunal (the Rules), for an interim measure restraining the Respondent from removing or allowing the removal of the Applicants from their land, pending the determination of the matter.

On 13 December 2007, the Tribunal granted the interim measure through its ruling which in the relevant part stated as follows:

> [T]he Tribunal grants the application pending the determination of the main case and orders that the Republic of Zimbabwe shall take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by orders, to evict from or interfere with the peaceful residence on, and beneficial use of, the farm known as Mount Carmell of Railway 19, measuring 1200.6484 hectares held under Deed of Transfer No. 10301/99, in the District of Chegutu in the Republic of Zimbabwe, by Mike Campbell (Pvt) Limited and William Michael Campbell, their employees and the families of such employees and of William Michael Campbell.

Following this ruling, the government of Zimbabwe directed its agents to ignore the interim relief as follows:

> Attention: Mr A.N.B. Masterson
> Re: SADC TRIBUNAL INTERIM ORDER: RELIEF
> FOR INTERVENERS
> Previous correspondence refers. The provisional order of the SADC Tribunal cannot and has not suspended the Attorney General's Constitutional responsibility to prosecute violators of any of Zimbabwe's existing criminal laws such as section 3 of the Gazetted Lands (Consequential Provisions) Act.
>
> As I stated in my previous minute to yourselves the Attorney-General's Office is proceeding with the prosecutions.
> Yours sincerely,
> J Tomana

DEPUTY ATTORNEY-GENERAL-CRIME
CC: Acting Attorney-General – Justice Patel

On 20 June 2008, the Applicants referred to the Tribunal the failure on the part of the Respondent (government of Zimbabwe) to comply with the Tribunal's decision regarding the interim reliefs granted. The Tribunal, having established the failure, reported its finding to the Summit, (which includes President Mugabe) pursuant to Article 32 (5) of the SADC Protocol.

The 2007 Campbell case is behind the unprecedented decision by the SADC Summit to suspend the Tribunal and the instruction by the SADC Heads of State and Government to the Secretariat to come up with another protocol substantially revising its mandate leading to the current political stand-off at the Windhoek based institution. In the Tribunal's judgment, the ouster clauses imposed by the Zimbabwe government on Zimbabwe courts from entertaining complaints from victims of agricultural land seizures constituted violation of their human rights as the SADC Treaty guarantees. The judgment also finds that that Amendment 17 to the Constitution of Zimbabwe which legalised these land seizures constituted a form of racial discrimination against white commercial farmers. The SADC Treaty forbids racial and other forms of discrimination. However, while the first point was unanimous, there was dissenting opinion on the latter point concerning the Amendment 17 being a form of racial discrimination. Justice Dr Onkemetse B Tshosa did not find the amendment a form of racial discrimination but opined that what it aimed at was 'agricultural land' and not 'white farmers' land and that it was because white farmers happened to be the majority of Zimbabweans holding agricultural land which was required for agricultural settlement that they were affected. In an *obita dicta,* the Learned Judge also observed that Campbell and other applicants admitted that some non-white commercial farmers were also affected by Amendment 17 which showed that the measure was not racial.

However, the Campbell application, which attracted 78 other white farmers joining the case as interveners, was provoked by radical changes to the Constitution of Zimbabwe particularly changes to the property clause in the Lancaster House or independence constitution which followed the 2000 referendum on a new constitution in Zimbabwe. In a first since independence, government lost the referendum

and the constitutional changes were abandoned. The aim of the proposed changes was to increase the powers of the President but the people rejected the proposals. Thereafter, however, government turned its anger to land which was mostly owned by white commercial farmers, a colonial legacy and amended the constitution to allow for land grabs legally sanctioned as 'land reforms'. Section 16B of Amendment 17 to Section 16 of the independence Constitution on the property clause came to provide as follows:

> 16B: Agricultural land acquired for resettlement and other purposes
> (1) In this section — "acquiring authority" means the Minister responsible for lands or any other Minister whom the President may appoint as an acquiring authority for the purposes of this section; "appointed day" means the date of commencement of the Constitution of Zimbabwe Amendment (No. 17) Act, 2004 (i.e. 16 September, 2005)
> (2) Notwithstanding anything contained in this Chapter
> (a) all agricultural land
> (i) that was identified on or before the 8th July, 2005, in the Gazette or Gazette Extraordinary under section 5 (1) of the Land Acquisition Act [Chapter 20:10], and which is itemized in Schedule 7, being agricultural land required for resettlement purposes; or
> (ii) that is identified after the 8th July, 2005, but before the appointed day (i.e. 16th September, 2005), in the Gazette or Gazette Extraordinary under section 5 (1) of the Land Acquisition Act [Chapter 20:10], being agricultural land required for resettlement purposes; or
> (iii) that is identified in terms of this section by the acquiring authority after the appointed day in the Gazette or Gazette Extraordinary for whatever purposes, including, but not limited to
> A. settlement for agricultural or other purposes; or
> B. the purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or
> C. the relocation of persons dispossessed in consequence of the utilization of land for a purpose referred to in subparagraph A or B; is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to in subparagraph (iii), with effect from the date it is identified in the

> manner specified in that paragraph; and
> (b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.
> (3) The provisions of any law referred to in section 16 (1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18 (1) and (9), shall not apply in relation to land referred to in subsection (2) (a) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2) (b), that is to say, a person having any right or interest in the land -
> (a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge;
> (b) may, in accordance with the provisions of any law referred to in section 16 (1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired.

3. Jurisdiction

On being seized of the application, the Tribunal first dealt with the issue of 'jurisdiction'. The Respondents (Zimbabwe government) questioned the jurisdiction of the Tribunal to entertain the matter given that the same was pending before the Zimbabwe Supreme Court. On this, the Tribunal observed:

> Before considering the question of jurisdiction, we note first that the Southern African Development Community is an international organization established under the Treaty of the Southern African Development Community, hereinafter referred to as "the Treaty". The Tribunal is one of the institutions of the organization which are established under Article 9 of the Treaty. The functions of the Tribunal are stated in Article 16. They are to ensure adherence to, and the proper interpretation of, the provisions of the Treaty and the subsidiary instruments made thereunder, and to adjudicate upon such disputes as may be referred to it.

The main lesson from this decision is that ousting the jurisdiction of local courts does not help State Parties dodge international justice to which they have subscribed on their own volition. An ouster clause

while denying local judges the power to scrutinise national actions and decisions and their impact on citizens' liberties ironically empowers international tribunals to entertain complaints from those citizens as first instance. Merely upon proof that local courts were stripped of local jurisdiction, the SAC Tribunal in this case has jurisdiction.

4. Attempts to Register the Campbell Judgment

Following their successful application to the SADC Tribunal, Campbell's legal agents attempted to register the international judgment without success. Patel J, who dismissed attempts to register the SADC Tribunal judgment, had the following words to say in support of his decision:

> This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.
>
> The obvious implications of the supremacy of the Constitution are two-fold. First, to the extent that the common law is invoked to enforce a foreign judgment, the common law must be construed and applied so as to conform with the Constitution and any feature of the judgment that conflicts with the Constitution cannot, as a matter of public policy, be recognised or enforced in Zimbabwe. The notion of public policy cannot be deployed and insinuated under cover of the common law to circumvent or subvert the fundamental law of the land. Secondly, I consider it to be patently contrary to the public policy of any country, including Zimbabwe, to require its government to act in a manner that is manifestly incompatible with what is constitutionally ordained.
>
> Although the Tribunal's decision, strictly regarded, is confined to the 79 applicants before it, its ramifications extend to the former owners of all the agricultural land that has been acquired by the Government since 2000 in terms of section 16B of the Constitution. In effect, enforcement of the decision *vis-à-vis* the 79 applicants in particular and compliance with it generally would ultimately necessitate the Government having to reverse all the land acquisitions that have taken place since 2000. Apart from the political enormity of any such exercise, it would entail the eviction, upheaval and eventual relocation of many if not most of the beneficiaries of the land reform programme. This programme, despite its administrative and practical shortcomings, is quintessentially a matter of

> public policy in Zimbabwe, conceived well before the country attained its sovereign independence. As for the doctrine of legitimate expectation, the applicants before the Tribunal and others in their position are absolutely correct in expecting the Government of Zimbabwe to comply with its obligations under the SADC Treaty and to implement the decisions of the Tribunal. However, I take it that there is an incomparably greater number of Zimbabweans who share the legitimate expectation that the Government will effectively implement the land reform programme and fulfill their aspirations thereunder. Given these countervailing expectations, public policy as informed by basic utilitarian precept would dictate that the greater public good must prevail.
>
> In the result, having regard to the foregoing considerations and the overwhelmingly negative impact of the Tribunal's decision on domestic law and agrarian reform in Zimbabwe, and notwithstanding the international obligations of the Government, I am amply satisfied that the registration and consequent enforcement of that judgment would be fundamentally contrary to the public policy of this country.

These words raise controversial questions. On one hand, it appears the Learned Judge was saying when it comes to registration and enforcement, international law must yield to local law. On the other hand, the Learned Judge appears to have been saying there is no chance to register an international judgment because doing so could force the State so ordered to violate its own law particularly the Constitution which it cannot. This raises far reaching questions more especially whether SADC was relevant at all if when it comes to enforcement of SADC decisions, State Parties can decline to by merely invoking local law? What becomes of the principle in international law of *sunt servanda* which defines treaties?

5. Conclusion

The August 2012 Maputo Summit decision to suspend the Tribunal was no doubt driven by Zimbabwe and more particularly the politics of that country which for the past three decades have been dominated by President Robert Mugabe. President Mugabe is simply too strong for any Head of State in the SADC to challenge. This has been exacerbated by the fact that the colonial land question in Zimbabwe as

in other countries including South Africa remains unresolved several years after independence. This means anyone could use land as political folder and this is what happened in Zimbabwe and is likely to happen again in Zimbabwe and other southern African countries. Reforms in this sector in most of these countries are either non-existent or moving rather too slowly.

The second problem is that other SADC Heads of State accord President Robert Mugabe with elevated status first as an elder statesman and second as the most educated among them. These factors enable Mugabe to guide or even bulldoze other SADC Heads of State sometimes dress them down if they take opposite views or views which seek to contradict his, particularly on Zimbabwe. There is indisputable information that Botswana President Ian Khama has been on the receiving end of President Mugabe over politics in Zimbabwe. Others are said to queue for advice from President Mugabe at various Summits. This gives him an upper hand during the Summit. Those who try to oppose him never do so in his presence which he has used to dominate Summit decisions — an example of which is the suspension of the SADC Tribunal for daring to decide against Zimbabwe, meaning in effect against Mugabe.