

Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal

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Abstract

*This article examines whether the SADC Tribunal's mandate and authority have any legal force in light of recent developments. These developments include the Tribunal's ruling in *Campbell v Republic of Zimbabwe*, the subsequent non-compliance by the Zimbabwean Government with the decision, the lack of concrete action taken by Southern African Development Community (SADC) members, and the Summit's decision to review the Tribunal's role. By analysing the *Campbell* ruling, the article shows that the current enforcement measures are inadequate, that the rules dealing with defaulting SADC members lack clarity, and that members use sovereignty to avoid international obligations. As a means of ensuring that the Tribunal upholds its mandate of promoting the rule of law, human rights and democracy, the article recommends that the review of the Tribunal's functions be speedily concluded, that SADC members adopt enforcement measures to address issues of non-compliance, and that members observe their international obligations in good faith.*

Introduction: The Tribunal

Article 9(1)(f) of the Treaty of the Southern African Development Community (hereinafter *the Treaty*) establishes the Tribunal as a SADC institution. Article 16 of the Treaty succinctly spells out the Tribunal's mandate and jurisdiction as follows:

... to ensure adherence to a proper interpretation of the provisions of the Treaty, subsidiary instruments and to adjudicate upon disputes referred to it,¹ [and] [to] give advisory opinions on such matters as the Summit or Council may refer to it.²

The decisions of the Tribunal are intended to be final and binding.³ This places the ultimate interpretation of the Treaty and any of its Protocols squarely within the preserve of the Tribunal.

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1 Article 16(1).

2 Article 16 (4).

3 Article 16 (5).

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Pursuant to Article 16 of the Treaty,⁴ in 2000 the Summit adopted the Protocol on the SADC Tribunal (hereinafter *the Protocol*). Annexed to the Protocol are the Rules of Procedure (hereinafter *the Rules*), which form an integral part of the Protocol.⁵

Since the Tribunal's inauguration, 19 cases have been submitted to its jurisdiction. Of these, 11 have been brought against the Zimbabwean Government, and most of them relate to the country's ongoing land reform programme.⁶

Campbell v Republic of Zimbabwe

The factual background

In October 2007, the first case related to Zimbabwe's agrarian land reform was lodged before the Tribunal in *Campbell v Republic of Zimbabwe*.⁷ In this matter, William Michael Campbell (Pvt) Limited (a company duly registered in terms of the laws of Zimbabwe) and Mike Campbell (in his capacity as manager of the farm) contested the acquisition of their farm by the respondent.

The applicants' farm, together with the farms of many other parties who later joined the proceedings, were compulsorily acquired by the respondent in terms of its land reform programme pursuant to Section 16B of Amendment 17 of the Constitution of Zimbabwe.⁸ Land acquired in this manner vested full title in the state⁹ without compensation to the dispossessed party, except for improvements effected on the land before it was acquired.¹⁰

Moreover, a person whose land has been acquired in terms of Amendment 17 is barred from challenging its acquisition in a court of law; the courts are also expressly prevented from hearing any such challenge.¹¹ However, a person

4 Article 16(2) directs that "the composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol adopted by the Summit".

5 Article 23 of the Protocol provides that "the Rules annexed to this Protocol shall form an integral part thereof".

6 Information available at <http://www.sadc-tribunal.org/pages/decisions.htm>; last accessed 18 November 2010.

7 SADC (T) 2/2007.

8 Amendment No. 17 of 2005. The pertinent provisions of Section 16B are to the effect that all agricultural land identified as being such and required for resettlement or settlement, for example, would be compulsorily acquired by the government.

9 Section 16B(2)(C).

10 Section 16B(2)(b).

11 Section 16B(3)(a).

with an interest or right in the land that has been acquired may challenge the amount of compensation for any improvements made.¹²

Notwithstanding the express ousting of the court's jurisdiction on the matter, the applicants instituted legal proceedings regarding the dispute in the Supreme Court of Zimbabwe, the ultimate court in that country. Before the court handed down its ruling, the applicants had also submitted an application to the SADC Tribunal, contesting the compulsory acquisition of their farm by the respondent.

The interim measure envisaged by Article 28 and Rule 61(2)–(5)

The applicants invoked Article 28 of the Protocol, as read with Rule 61(2)–(5) of the Rules. The Rule in question provides for interim relief aimed at restraining the respondent from removing or allowing the removal of the applicants from their property, and ordering the respondent to take all necessary and reasonable steps to safeguard the occupation by the applicants of the said properties until such time that the dispute has been finally settled. In essence, the applicants sought an interdict to preserve the status quo regarding the agricultural land in dispute until the Tribunal had rendered its final ruling on the matter.

In deciding whether the interim relief could be granted, certain preliminary issues had to be determined, namely whether the Tribunal had jurisdiction over the matter, and whether the application was consistent with Article 28 of the Protocol. As far as the jurisdiction was concerned, the Protocol makes a distinction between the “basis”¹³ and the “scope”¹⁴ of jurisdiction. The *basis* of jurisdiction refers to the subject matter of the dispute, in that the dispute must essentially be concerned with the interpretation and application of the Treaty, the Protocols, and other SADC legal instruments. On the other hand, the *scope* of jurisdiction refers to the parties who are eligible to appear before the Tribunal as parties to a dispute.

With regard to the scope of jurisdiction, Article 15(1) of the Protocol confers upon the Tribunal jurisdiction over all disputes between members, and between natural or legal persons and members.¹⁵ On this point the Tribunal was satisfied that there indeed was a dispute between a natural person (William Michael Campbell) and a legal person (Mike Campbell (Pvt) Limited) and a member state (the Republic of Zimbabwe). The Tribunal concluded that the matter was indeed properly before it.

12 Section 16B(3)(b).

13 Article 14.

14 Article 15.

15 Article 15(1), as amended by Article 6 of the Agreement Amending the Protocol on the Tribunal of 3 October 2002.

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Article 14 of the Protocol enumerates three bases of jurisdiction. Firstly, and in particular, Article 14(a) confers jurisdiction on the Tribunal in matters concerning the interpretation and application of the Treaty. The Tribunal pointed out that, in the present application before it, not only was the relevant provision of the Treaty which required interpretation and application its Article 4, which requires member states to act in accordance with a number of principles, but also that the principles of human rights, democracy and the rule of law were themselves pertinent in this case.¹⁶ Therefore, SADC – both as a collective and in respect of each individual member state – is legally bound to respect and protect the human rights of SADC citizens, and ensure democracy and the rule of law are promoted in its respective member states' territories.

Secondly, the matter before the Tribunal involved agricultural land which the applicants alleged had been alienated by the respondent. Clearly, this was a matter requiring the interpretation and application of the Treaty, thus bestowing jurisdiction on the Tribunal.

And thirdly, the Tribunal found that the applicants could rely on Article 28 and Rule 61, which both empower the Tribunal to grant provisional measures as necessary upon good cause being shown by the party seeking relief. In this process, the Tribunal employed a municipal law four-step criterion that courts utilise for the granting of interdicts. The first question was whether there was a prima facie right for which protection was being sought. The second entailed whether there was an anticipated or threatened interference with that right. Thirdly, there was the question of the presence or absence of an alternative remedy, and fourthly, there was the issue of the balance of convenience in favour of the applicant or a discretionary decision in favour of the applicant that an interdict was the appropriate relief in the prevailing circumstances.¹⁷

The Tribunal was satisfied that, to begin with, there was indeed a prima facie right deserving protection, namely, the right to peaceful occupation and use of the land. Furthermore, the Tribunal found that there was an anticipated or threatened interference with the said right. Finally, it was found that the applicant did not have any alternative remedy. In view of this analysis, the Tribunal concluded that the balance of convenience favoured the applicants as they would suffer prejudice if the interim relief was not granted. Moreover, the respondent would not be prejudiced by granting the relief sought. Indeed, the respondent conceded this point.

16 Article 4 provides that "SADC and its Member States shall act in accordance with the following principles:

...

(c) human rights, democracy and the rule of law."

17 *Gideon Stephanus Theron & Others v The Republic of Zimbabwe* SADC (T) 02/2008; *Douglas Stuart Taylor-Freeme & Others v The Republic of Zimbabwe* SADC (T) 03/2008.

Notably, this was the first time that the Tribunal considered granting an interim measure. Therefore, its use of the domestic law criteria set a crucial precedent which was followed by the Tribunal in subsequent matters brought before it.¹⁸

Accordingly, the Tribunal granted the interim relief and ordered that the respondent refrain from taking steps that would interfere with the peaceful residence on and beneficial use of the applicants' property.¹⁹

Applications to intervene in terms of Article 30 and Rule 70

Following the granting of the interim order in *Campbell*, 77 other parties in *Gideon Stephanus Theron & Others v Zimbabwe*²⁰ submitted urgent applications before the Tribunal to intervene in the proceedings as applicants in terms of Article 30 of the Protocol and Rule 70 of the Rules. The relevant provisions allow a party whose legal interests may affect or be affected by a matter before the Tribunal to submit a written application for permission to intervene.

Similarly, the interveners also sought an interim order against the respondent aimed at preserving the status quo pending the finalisation of the matter by the Tribunal. The interveners contended that the relief granted in *Campbell* was a matter of principle, not unique to the factual scenario of that case. As a result, any other party granted leave to intervene in *Campbell* should also be granted the same interlocutory relief without discrimination.

In considering the interim relief application, the Tribunal employed the four criteria applied in *Campbell*. Thus, the Tribunal found for the applicants and the interim relief was granted.²¹ The terms and wording of the orders were the same as those granted in *Campbell*, and were to the effect that the respondent

18 *Andrew Paul Rosslyn Stidolph & Others v The Republic of Zimbabwe & Another* SADC (T) 04/2008; *Anglesea Farm (Pvt) Ltd & Others v The Republic of Zimbabwe & Another* SADC (T) 06/2008.

19 The relevant excerpt of the interim order stated the following: "[T]he Tribunal grants the application pending the determination of the main case and orders that the respondent shall take no steps, or permit steps to be taken, directly or indirectly, whether by its agents or by its orders, to evict from or interfere with the peaceful residence on and beneficial use of, the farm known as Mount Carmel of Railway 19, measuring 1200.6448 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".

20 SADC (T) 02/2008; SADC (T) 03/2008; SADC (T) 04/2008; SADC (T) 06/2008.

21 However, the Tribunal could not grant the interim relief to all the applicants/intervenors as 3 of the applicants had already been evicted by the respondent at the time that the matter was heard by the Tribunal.

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refrain from interfering with the peaceful residence in, and the beneficial use of, the applicants' properties until the Tribunal adjudicated upon the matter.²²

The Tribunal's findings

In essence, the applicants' claim was that the compulsory acquisition of their lands was in breach of the respondent's Treaty obligations. Therefore, their prayer was that the Tribunal should declare these acquisitions illegal. This claim they based on five grounds, namely that –

- the enactment and implementation of Amendment 17 violated certain provisions of the Treaty
- the acquisitions were done unlawfully, in that the Minister responsible for land resettlement had failed to establish that he had used an objective and reasonable criterion to identify the lands suitable for acquisition in terms of the respondent's land reform programme
- Amendment 17 denied applicants access to courts to contest the acquisitions
- the applicants were victims of racial discrimination since their farms were the only lands to be acquired pursuant to Amendment 7, and
- they had been denied compensation for their farms compulsorily possessed by the respondent.

In response, the respondent submitted, firstly, that the Tribunal should not hear the dispute as it lacked the requisite jurisdiction. Furthermore, the respondent pointed to the agrarian reform having been conducted on a 'willing buyer–willing seller' basis. The respondent added that the fact that the lands acquired belonged to white farmers had to be attributed to the country's colonial history, which had resulted in the majority of fertile land being owned by those farmers. Therefore, the respondent stated that the land reform should be seen as a legitimate means to achieving an equally legitimate end aimed at correcting colonial land imbalances. The contention that the applicants' farms were the prime targets was unfounded, maintained the respondent, because land had also been acquired from black farmers with large tracts of property. In addition, the land reform programme had been prompted by the immense demand for land from the government. On the matter of compensation, the respondent contended that it had been provided for in Amendment 17. Finally, the respondent claimed the applicants had not been denied access to the courts; on the contrary, the respondent stated that the parties could utilise judicial review.

22 It must be noted that two subsequent separate applications, albeit unsuccessful, were also made seeking to intervene in the proceedings in *Albert Fungai Mutize & Others v Campbell & Others* SADC (T) 08/2008 and *Nixon Chirinda & Others v Campbell & Others* SADC (T) 09/2008.

The issues in contention

In determining the issues, the Tribunal grouped them under four headings. These were the Tribunal's jurisdiction to hear the matter; the denial of the applicants' right to access to domestic courts in Zimbabwe; racial discrimination against the applicants; and the question of compensation for the lands acquired.

Jurisdiction

The Tribunal, as one of the institutions established by the Treaty, is tasked with the responsibility of ensuring adherence to, and the proper interpretation of, the Treaty's provisions and the subsidiary instruments, and to consider such disputes as may be submitted to it. Article 14(a) of the Protocol confers the Tribunal with jurisdiction over disputes brought in accordance with the Treaty. The Tribunal reasoned that, for the present case, such was the basis and scope of the jurisdiction of the Tribunal.

The respondent argued that the applicants had not exhausted local remedies – a precondition necessary to trigger the Tribunal's jurisdiction²³ – particularly since the first and second applicants (Mike Campbell (Pvt) Limited and Michael William Campbell) had instituted legal proceedings in Zimbabwe's Supreme Court, contesting the validity of the acquisition of their farm by the respondent.²⁴ As the Supreme Court had not handed down its judgement by the time the applicants brought their case before the Tribunal, the respondent claimed the applicants had not yet exhausted all the available domestic remedies. Therefore, the respondent argued that the Tribunal lacked the requisite jurisdiction on the matter.

The concept of *exhaustion of local remedies* is by no means unique to the Protocol as it features in numerous international tribunals. The International Court of Justice has described it as "a well-established rule of customary international law" aimed at allowing the state the opportunity, where a violation has occurred, to redress it by its own means within its municipal legal system.²⁵ For example, the African Charter on Human and Peoples' Rights (hereinafter *African Charter*) stipulates that the African Commission on Human and Peoples' Rights (hereinafter *African Commission*) can only deal with a matter submitted to it after all available local remedies have been used.²⁶ Similarly, the

23 Article 15(2) of the Protocol.

24 In the Supreme Court, the applicants had based their claim on, inter alia, the fact that Amendment 17 eliminated their right to equal treatment before the law; to a fair hearing before an independent and impartial court; and their right not to be discriminated against on the basis of race or place of origin regarding land ownership.

25 *Interhandel* Case 1959 ICJ Reports 6 at 27.

26 Article 50.

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European Convention for the Protection of Human Rights and Fundamental Freedoms provides that the European Commission of Human Rights may only deal with a matter after all domestic remedies have been exhausted.²⁷

This principle directs parties to first exhaust municipal remedies, that is, from the lowest court to the highest court in the land, prior to engaging extraterritorial tribunals. The principle's *raison d'être* is to afford domestic courts the opportunity to deal with matters which they are best placed to decide upon as they can apply the relevant national laws with ease, and also to ensure that international tribunals do not, in a sense, usurp the jurisdiction of local courts that can speedily ensure that justice is done. The principle also has much to do with common sense.

However, the principle of exhausting local remedies is not absolute and may not be complied with in cases where the domestic law does not offer a remedy or the remedy available is futile.²⁸ Article 15(2) of the Protocol obviates the need to pursue local remedies where one "is unable to proceed under the domestic jurisdiction". Similarly, the African Charter provides that this principle need not be adhered to if it is clear that the procedure of achieving the remedy will be unduly prolonged. Therefore, in such situations, a party is at liberty to seek the audience of an international tribunal for redress.

Seen in this light, Amendment 17 – which ousts the jurisdiction of Zimbabwe's law courts from any matter connected to the acquisition of land – may also be said to oust the requirement to exhaust all local remedies before lodging a matter before the Tribunal. In view of the Amendment's provisions, the first and second applicants were not able to institute effective proceedings under their domestic law.²⁹

The respondent further contended that the Treaty simply outlined the principles and objectives of SADC, without providing the standards against which members' actions could be measured. As such, the respondent stated that the Tribunal could not rely on standards derived from other treaties as that would be tantamount to legislating on behalf of SADC members,

27 Article 26.

28 Dugard, J, D Bethlehem, M du Plessis & A Katz. 2005. *International Law: A South African perspective* (Third Edition). Lansdowne: Juta, p 293.

29 This position was confirmed by the Supreme Court of Zimbabwe handed down on 22 February 2008 in *Mike Campbell (Pvt) Limited v Minister of National Security Responsible for Land, Land Reform and Resettlement* SC49/07, where the court dismissed the applicants' claim. The Supreme Court stated that the determination of the extent to which constitutional protection of property rights might be protected was of a political and legislative nature; hence, the acquisition and the manner thereof were not judicial questions. Furthermore, the legislature had, in the clear and unequivocal language of Amendment 17, excluded the jurisdiction of the court in land acquisition matters.

a function that belonged to the Summit as SADC's supreme policymaking body with the authority to adopt legal instruments for the implementation of the Treaty.³⁰ Moreover, although numerous SADC Protocols had been adopted, none specifically addressed the issue of human rights and agrarian reform. Therefore, the respondent submitted, there first had to be a Protocol addressing such matters so as to give effect to the Treaty's principles. The respondent further argued that the duty of the Tribunal was to interpret the law as adopted by members and, where there was no specific relevant law, the Tribunal could not exceed its mandate and rule on the validity of Zimbabwe's land reform in the absence of applicable SADC law.

In response, the Tribunal concisely and elaborately pointed out otherwise, relying on the Treaty's provisions, the Protocol, and the principles of public international law. It maintained that Article 21(b) of the Protocol enjoined the Tribunal not only to develop its own jurisprudence, but also to take cognisance of applicable treaties, general principles and rules of public international law as its sources of law. Consequently, the Tribunal opined, where the Protocol is silent, the Tribunal has recourse to these sources of law. Furthermore, the Tribunal found that it is not necessary for a Protocol on human rights and agrarian reform to be adopted in order to give effect to the Treaty's principles, particularly in light of Article 4(c) of the Treaty, which enjoins members "to act in accordance with the principles of human rights, democracy and the rule of law". This in itself, the Tribunal concluded, was sufficient ground to confer jurisdiction upon it to adjudicate disputes concerning human rights, democracy and the rule of law – matters which were significant in this case.

The respondent could also not rely on its municipal laws, namely Amendment 17, to avoid its treaty obligations. The Vienna Convention of the Law of Treaties specifically deals with such situations and stipulates, in Article 27, that a party may not cite its domestic law as justification for not fulfilling any international agreement. This makes it clear that compliance with the dictates of domestic laws is not a defence to breach of international responsibilities by a state. To do so would allow states to evade their international law duties simply by enacting domestic legislation.

Therefore, the Tribunal unanimously held that it had jurisdiction to hear the matter.

Access to justice

The question was whether the applicants had been denied access to the courts and whether they had been deprived of a fair hearing. These two fundamental rights are encapsulated in the principle of the rule of law, which is one of the

30 Article 10 of the Treaty. However, the Summit may delegate this authority to any other SADC institution, as it may deem fit.

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principles in the Treaty: Article 6(1) directs members to respect the rule of law and to refrain from taking measures jeopardising the substance of these principles. Thus, members have a duty to protect the right of access to the courts and the right to a fair hearing.

As regards the right of access to the courts, the Tribunal referred to various interpretations of such right by prominent international tribunals, among them the African Commission, which dealt with this issue in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*.³¹ The matter dealt with ouster clauses preventing Nigerian courts from hearing cases brought by publishers contesting the search and seizure of their premises. The Commission held that such a state of affairs would result in a legal situation where the judiciary could no longer provide a check on the executive branch of the government, which was inimical to constitutional democracy. In yet another matter before the African Commission, namely *Zimbabwe Human Rights NGO Forum v Zimbabwe*,³² where a clemency order exonerating perpetrators for politically motivated crimes prevented the complainant from having recourse for such crimes, the Commission held that, in order for the rule of law to be upheld, individuals whose rights had been infringed had to have an effective remedy, without which the rights on their own were of little value.

In incisive detail, the Tribunal stated that the role played by the courts was of cardinal constitutional significance, and that legislation that asserted to get rid of the power of the courts to hear matters affecting individuals' rights was contrary to the rule of law, which required that individuals had access to the courts. With reference to Amendment 17, the Tribunal held that the actions undertaken in terms of Section 16B impinged on the constitutional right to the protection of the law and to a fair hearing, particularly in light of the Amendment's wording that expressly deprived the applicants of approaching the courts for recourse for their expropriated property. The Tribunal was, therefore, satisfied that the applicants had been deprived of their lands without being afforded the opportunity to access the courts and to obtain a fair hearing; consequently, the respondent had acted in breach of Article 4(c) of the Treaty.

Thus, the Tribunal unanimously concluded that the applicants had indeed been denied access to the courts of Zimbabwe.

Racial discrimination

The applicants also contended that the land reform pursuant to Amendment 17 was racially motivated, as it was based solely on considerations of race and ethnic origin and was aimed specifically at white people, regardless

31 Comm. No. 140/ 94, 141/ 94, 145/ 95 (1999).

32 Comm. No. 245 (2002).

of whether they had acquired the land during the colonial period or after Zimbabwe's independence. Furthermore, even if Amendment 17 made no overt reference to race or colour, this did not mean that it did not target white-owned farms because there was clear legislative intent directed only at white farmers. Based on this, the applicants argued, the respondent, by enacting and implementing Amendment 17, was in breach of Article 6(2) of the Treaty, which precluded members from discriminating against anyone on the basis of race, *inter alia*.

In rebuttal, the respondent submitted that the agrarian reform programme was meant to benefit people who had been historically disadvantaged during colonial rule. Consequently, it was against this background that applicants' lands were identified and acquired. The respondent maintained that, as such, this could not be labelled as racism, and they had not flouted Article 6(2) in their opinion.

The Tribunal pointed out that discrimination, in whatever form, was outlawed in international law by numerous treaties such as the United Nations Charter,³³ the Universal Declaration of Human Rights,³⁴ the International Covenant on Civil and Political Rights,³⁵ the African Charter,³⁶ and the Convention on Elimination of All Forms of Racial Discrimination (hereinafter *Convention*). The Tribunal pointed out that the respondent had acceded to the African Charter and the Convention.

While the Treaty does not define *racial discrimination*, the Convention in Article 1(1) defines it as discrimination based on race which has the purpose or effect of nullifying or impairing the recognition or enjoyment and exercise on an equal footing of human rights. The Tribunal rightly concluded that the respondent was duty bound to respect and protect non-discrimination of any kind, and to this end prohibit any racial discrimination in its laws, policies and practices. This is, of course, in addition to the fact that the Treaty itself expressly prohibits racial discrimination in Article 6(2).

Thus, it rested on the Tribunal to decide whether, in the absence of specific reference to race, one could say that there had been discrimination. The Tribunal found that, even if there was no such express mention, the effect of Amendment 17 would be felt by white farmers. The treatment meted out

33 Article 1(3) encourages respect for human rights for all, without distinction as to race.

34 Article 2 grants everyone all the rights set forth in the Declaration, without distinction of any kind, i.e. including distinctions according to race.

35 Article 2(1) requires that parties to the Covenant are obliged to respect all individuals without distinction of any kind, i.e. including distinctions according to race.

36 Article 2 provides that every individual shall be entitled to the rights set forth, without discrimination of any kind, i.e. including distinctions according to race.

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to the applicants was discriminatory, therefore. The aim of the government's land reform would have been legitimate if the criteria for identifying the land were objective and reasonable, fair compensation was paid for lands acquired, and the lands were indeed distributed to the poor, landless and other disenfranchised groups. This reasoned conclusion signifies that the Tribunal acknowledges, and rightly so, existing land imbalances, but that the correction of such disparities has to be achieved within the limits of the rule of law. In *Commercial Farmers Union v Minister of Lands*,³⁷ Zimbabwe's Supreme Court itself recognised the crucial role that the rule of law plays, when it acknowledged that, if the expropriation of white-owned land were to be conducted under the rule of law, it would not be discriminatory.

The Tribunal, by a majority of four to one, held that the applicants had been discriminated against on the basis of race, and that, therefore, Article 6(2) of the Treaty had been violated. The Tribunal unanimously found the respondent to be in breach of its obligations under Article 4(c) of the Treaty. In addition, the Tribunal also unanimously directed the respondent to take reasonable measures to protect the possession, occupation and ownership of the applicants' lands.

Compensation

The applicants contended that the expropriation of their land by the respondent without compensation was in breach of international law and the Treaty. International law requires the expropriating state to pay compensation. The respondent could not rely on its national law to circumvent its international obligations; regardless of the manner in which the farms were acquired or the aims thereof, compensation was due and payable. Regarding the three applicants already evicted, the Tribunal ordered that the respondent pay fair compensation on or before 30 June 2009.

Enforcement of the Tribunal's decisions

Article 16(5) of the Treaty provides that the Tribunal's decisions are final and binding. On the other hand the responsibility of enforcing and executing the Tribunal's rulings primarily lies with member states.³⁸ It is in the enforcement of its decisions that the Tribunal is lacking in fulfilling its mandate.

Article 32 of the Protocol stipulates that a member's rules of civil procedure regarding enforcement of foreign judgments, and in whose territory a judgment

37 2001 (2) SA 925 (ZSC).

38 Ruppel, OC & FX Bangamwabo. 2008. "The SADC Tribunal: A legal analysis of its mandate and role in regional integration". In Bösl, A, W Breytenbach, T Hartzenberg, C McCarthy & K Schade (Eds). *Monitoring Regional Integration in Southern Africa Yearbook*. Stellenbosch: Trade Law Centre for Southern Africa, p 21.

is to be enforced, govern such enforcement. In addition, SADC and members' institutions are obliged to take the necessary steps to ensure such execution.

Owing to the respondent's failure to abide by the Tribunal's two interim orders, the applicants, pursuant to Article 32(4) of the Protocol,³⁹ proceeded to file an urgent application seeking an order that the respondent was in breach and contempt of the Tribunal's interim rulings.⁴⁰ The Tribunal found in favour of the applicants, and ruled that it would proceed in terms of Article 32(5) of the Protocol. The stated Article provides that, if non-compliance by a member with a decision has been shown to exist, the Tribunal is obliged to report the same to the Summit in order for the latter to take "appropriate action". Since the content of *appropriate action* is not defined, it is submitted that this provision is inadequate and ambiguous and should be dealt with, as it contributes to the Tribunal's weaknesses as far as enforcement is concerned. A clear rule dealing with non-complying states should be clearly spelt out to prevent members from escaping their international legal obligations.⁴¹

The respondent also failed to comply with the Tribunal's ruling in the main ruling in *Campbell*,⁴² in respect of which the applicants also sought the Tribunal to declare the respondent to be in breach and contempt of the ruling. The Tribunal once again found in favour of the applicants and again referred the matter to the Summit in terms of Article 32(5). The Zimbabwean Government issued a statement to the effect that the state was not bound by the regional court's ruling, and regarded it as being null and void of any legal effect.⁴³ It would seem, judging from Zimbabwe's stance, as if issues of national sovereignty take precedence over the rule of law. This is actually in contrast with the principle of sovereignty which requires that states themselves be subject to the rule of law.

Another application in terms of Article 32(4), based on the respondent's continued disregard of the Tribunal's rulings, was lodged with the Tribunal in

39 Article 32(4) allows any party concerned to report a member's non-compliance with a Tribunal ruling.

40 *Campbell v Republic of Zimbabwe* SADC (T) 11/2008.

41 Coleman, G & G Erasmus. 2008. "Regional dispute resolution: The SADC's first test". Available at http://www.tralac.org/unique/tralac/pdf/20080205_hotseat.pdf; last accessed 20 December 2010.

42 *Campbell v Republic of Zimbabwe* SADC (T) 03/2009. Evidence was tendered showing non-compliance, which included the respondent's contention that the Tribunal lacked jurisdiction and that its ruling was "nonsense" and of "no consequence", and that the respondent planned to resume with the prosecution of defaulting farmers under Zimbabwe's Land (Consequential Provisions) Act.

43 "Zimbabwe not bound by regional court ruling: Justice Minister". Available at <http://jurist.org/paperchase/2010/07/zimbabwe-is-not-bound-by-sadc-rulings-justice-minister.php>; last accessed 11 January 2011.

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Louis Karel Fick & Others v Republic of Zimbabwe.⁴⁴ The Tribunal once again found in favour of the applicants based on the evidence supplied to it, which included a letter from the respondent stating that it would no longer submit itself to the Tribunal's jurisdiction, that any decision rendered by the Tribunal would be null and void, and that the High Court of Zimbabwe, citing the country's public policy, declined to register or enforce the Tribunal's ruling.⁴⁵ Once more, the Tribunal found for the applicants and also made the same order pursuant to Article 32(5), referring the matter to the Summit.

The applicants proceeded to make an application to the High Court of South Africa in order to register and enforce the Tribunal's main ruling in *Campbell* in terms of Article 32(1) of the Protocol. The application met with success, and property belonging to the respondent located in South Africa was attached. However, in the High Court of South Africa, the respondent challenged the attachment of these properties on the grounds that they were diplomatic properties and, therefore, immune to attachment. The High Court only confirmed the writ of execution for one property which was being used for commercial purposes, while the writs of execution against the other properties were declared invalid and set aside because the properties were indeed diplomatic property and, therefore, immune from attachment.⁴⁶

In light of the above, the current position regarding the enforcement of the Tribunal's decisions is an impediment to its mandate. Bestowing upon the Tribunal the mandate of ensuring respect for the rule of law, human rights and democracy is rendered useless if it is not simultaneously empowered with the authority to ensure compliance with its rulings. Unless members observe their Treaty obligations in good faith, the Tribunal's decisions will remain unenforceable.

The authority of the Summit to enforce decisions

The Summit, composed of Heads of State and Government and established by Article 9 of the Treaty, is the SADC's principal organ tasked with the overall

44 SADC (T) 01/2010.

45 *Gramara (Private) Limited & Another v Government of the Republic of Zimbabwe* HC 33/09.

46 *The Republic of Zimbabwe v Sheriff Wynberg North & Others* 2009/34015 [2010] ZAGP JHC 118. The decision in this case was handed down on 22 November 2010, and the case is presently unreported (available at <http://www.saflii.org/za/cases/ZAGPJHC/2010/118.html>; last accessed 30 November 2010). South Africa's Foreign States Immunities Act, 1981 (No. 87 of 1981) precludes the attachment of foreign states' movable or immovable property in order to enforce a judgment without the written consent of the foreign state. However, this does not apply to property which is used or intended for use for commercial purposes.

responsibility of policy direction and control of SADC functions.⁴⁷ In terms of Article 32(5) of the Protocol, the Summit is the ultimate body to decide on the course of action to be taken in cases where a member disregards a ruling by the Tribunal. Article 33 of the Treaty provides that sanctions may be imposed against any member that, without good reason, persistently fails to fulfil its Treaty obligations or implements policies that undermine the trade bloc's principles and objectives. Furthermore, Article 33(2) enjoins the Summit to determine these sanctions on a case-by-case basis. Unfortunately, neither the Protocol nor the Treaty provides any examples of the possible sanctions as guidance.

In order for the Summit to reach a binding decision, such decision needs to be reached by consensus.⁴⁸ Article 19 of the Treaty further reinforces this position by stating that, unless provided otherwise, decisions by SADC institutions are to be taken by consensus. It is important, therefore, to predict the possibility of SADC imposing any sanctions in the near or even distant future on the Zimbabwean Government in particular for its failure to implement the Tribunal's ruling(s), or any other member state. Thus, because the Summit's decisions are to be reached by consensus, it means that even the member against whom sanctions are being contemplated has to agree to such an action. It is quite unthinkable to imagine a member willingly submitting or supporting the imposition of sanctions against itself.

The decision to review the role, function and terms of reference of the Tribunal

A month after the Tribunal's ruling in *Louis Karel Fick & Others v Republic of Zimbabwe*, the SADC Summit was held. While no official response has been forthcoming from SADC regarding Zimbabwe's disdain of the Tribunal's rulings, SADC members adopted a decision during the Summit to the effect that a review be undertaken within a period of six months regarding the role, functions and terms of reference of the Tribunal.⁴⁹ The SADC Secretariat has since commissioned a study to review the Tribunal's mandate as outlined in Article 16 of the Treaty, and to make recommendations regarding the reluctance of member states to relinquish some of their sovereignty to the regional organisation.⁵⁰

47 Article 10 (2) of the Treaty .

48 Article 10(8) of the Treaty stipulates that "unless otherwise provided for in this Treaty, the decisions of the Summit shall be by consensus and shall be binding".

49 *Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government* (2008:para. 32).

50 "Review of the role, responsibilities and terms of reference of the SADC Tribunal". Available at <http://www.sadc.int/index/browse/page/790>; last accessed 2 December 2010.

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While the review of the Tribunal's structure and function is not in itself irregular, the same cannot be said of the effect that this decision has had on the work of the Tribunal. The Tribunal's power to receive and hear new matters has been withdrawn. The Summit failed to renew the terms of office of the judges whose tenure had expired.⁵¹ This state of affairs should also be viewed in light of the provisions of Article 3 of the Protocol, which deal with the Tribunal's constitution and composition. A reading of Article 3 in its entirety shows that the Tribunal is obliged, at all times, to have ten members, and that there are to be five members available to constitute a full bench. There are currently only four sitting Tribunal members.⁵² The cumulative effective of the above is that, with only four sitting members, the Tribunal is not properly constituted. Procedurally, therefore, even assuming that the Tribunal had not been ordered to stop hearing new matters, the Tribunal lacks sufficient judges to be properly constituted. Consequently, the Summit's decision in intent and effect suspended the Tribunal.

It is unfortunate that SADC, as a collective, by suspending the Tribunal, failed to take this opportunity to guarantee the latter's effectiveness. One would have hoped that the Summit would welcome the occasion to assert and reaffirm the Tribunal's mandate by calling for the enforcement of its decisions. Instead, the Summit effectively suspended the Tribunal. Regrettably, an unenviable precedent has been set that might be followed by other members, namely to allow the principle of sovereignty to trump over the wider interest of integration – even though, by signing SADC instruments, members have in effect surrendered a certain amount of sovereignty to the supranational body.⁵³

Conclusion

While the decisions of the Tribunal are final and binding, their enforcement ultimately lies with the Summit. One needs to bear in mind the crucial role that dispute settlement institutions such as the Tribunal play in sustaining regional integration processes. In this regard, greater commitment, political will and

51 Southern Africa Litigation Centre, Centre for Human Rights and Rehabilitation (Malawi), Botswana Centre for Human Rights, Africa Regional Office of the International Commission of Jurists, Legal Assistance Centre (Namibia), Open Society Justice Initiative, Socio-economic Rights Institute of South Africa & Zimbabwe Exiles Forum. 2010. "Implications of the decision to review the role, function and the terms of reference of the SADC Tribunal", p 6. Available at http://www.southernafricalitigationcentre.org/news/item/SADC_Tribunal_The_Effective_Suspension_of_the_SADC_Tribunal; last accessed 4 December 2010.

52 Southern African Litigation Centre et al. (ibid.8). It should be noted that six positions are currently vacant, five of which are due to the Summit's failure to renew the terms of office of those judges whose tenure had expired. The sixth fell vacant after Zimbabwe withdrew its Tribunal member.

53 Ruppel & Bangamwabo (2008:26).

good faith are needed from members to implement the Treaty's objectives, principles and provisions. On this issue the buck, so to speak, stops with the Summit as far as the enforcement of the Tribunal's rulings is concerned.

While the Tribunal's jurisprudence is still meagre, in light of the few years it has been in operation, it has nonetheless shown itself to be competent – as evidenced by the well-articulated *Campbell* judgments. One cannot but applaud the Tribunal for the manner in which it interpreted SADC's legal instruments and related them to other international instruments, and in the process developed a unique SADC jurisprudence within international legal developments and accepted standards. In view of the Summit's decision to review the Tribunal's role and function, which has effectively suspended the Tribunal's work, one hopes that an expeditious solution will be reached to enable the Tribunal to fulfil its mandate, lest it turn into a white elephant.