Chapter 7

Enforcing judgments of the SADC Tribunal in the domestic courts of member states*

Richard Frimpong Oppong

1. Introduction

The *Mike Campbell* litigation[1] is perhaps the most controversial case that has come before a regional economic community court (hereafter 'community court') in Africa. In *Mike Campbell*, the Southern African Development Community (SADC) Tribunal was confronted for the first time with a challenge to a major and controversial national policy: Zimbabwe's agricultural land reform policy. The jurisprudence of the Tribunal is rich and interesting. However, from a private international law perspective, even more engaging are recent attempts to enforce the Tribunal's judgment in the domestic courts of member states. These attempts have been met with varied responses. In January 2010, the High Court of Zimbabwe refused to register and enforce a judgment resulting from the litigation, but a month later, the South African High Court came to a different conclusion. It is possible that in the near future courts in Namibia and other SADC member states would be confronted with requests to enforce judgments of the Tribunal. Indeed, given that there are currently other active community courts in Africa, such as the East African Court of Justice, the Economic Community of West African States Court of Justice and the Court of Justice of the Common Market for Eastern and Southern Africa, the issues discussed here are of continental importance.[2]

* Parts of this paper are drawn from sections of Chapter 8 of my forthcoming book. See Oppong (2011).

[1] This litigation has generated a host of decisions from the SADC Tribunal. See: Albert Fungai Mutize v Mike Campbell (Pvt) Ltd. (2008); Louis Karel Fick v The Republic of Zimbabwe (2010); Mike Campbell (Pvt) Ltd. v The Republic of Zimbabwe (2008); Mike Campbell (Pvt) Ltd. v Republic of Zimbabwe (2007); Nixon Chirinda v. Mike Campbell (Pvt) Ltd (2008); William Michael Campbell v The Republic of Zimbabwe (2009). Politically, the reaction to these decisions has been very unfavourable, particularly in Zimbabwe. At the 30th Jubilee Summit of the SADC Heads of State and Government in August 2010 it was decided that 'a review of the role, functions and terms of reference of the SADC Tribunal should be undertaken'. The results of this review are likely to undermine the operation and jurisdiction of the Tribunal.

[2] Because the treaties regulating these courts also envisage enforcing their judgments using national courts, a broad approach is taken in the discussion to cover them too.

This paper examines from a private international law perspective the existence or lack thereof of a regime for enforcing judgments of international courts[3], and for that matter the SADC Tribunal, in SADC member states. At present, while SADC member states have regimes for enforcing judgments from foreign national courts (hereafter 'foreign judgments'), they do not have regimes for enforcing judgments of international courts (hereafter 'community judgment'), including the SADC Tribunal.

Enforcing a community judgment raises issues which are not present when enforcing a foreign judgment. This paper argues that the existing regimes for enforcing foreign judgments cannot be used to enforce judgments of the SADC Tribunal. A new and special regime is needed for the enforcement of community judgments. The enactment of legislation which gives national courts jurisdiction to enforce community judgments and deals with other issues attendant with the exercise of that jurisdiction is particularly important. To aid this, the paper provides model legislation on the enforcement of community judgments and recommends its adoption and enactment in SADC member states and, indeed, other African states.

2. Enforcing community judgments in national courts

There has been a proliferation of community courts in recent decades. It is part of the much broader phenomena of proliferation of international courts with compulsory jurisdiction (Romano 1999:709 and 2007:791) and judicialisation of international dispute-settlement procedures (Keohane et al. 2000: 457). Currently, Africa is host to at least four active community courts. The proliferation of community courts has been matched by an improvement in the legal status of individuals appearing before them. Historically, individuals have been granted no or restricted standing rights before international courts.[4] In this context, individuals include all non-state entities such as natural persons, companies, associations and non-governmental organisations. The traditional view prevailed: only states are subjects of public international law. Recently, individuals have been granted *locus standi* to litigate before some international courts. What was essentially the preserve of states has

[3] A community court is an international court operating on a regional basis and under a regional economic integration treaty. A community court faces challenges similar to those faced by international courts, including challenges relating to enforcement of judgments.

[4] See Statute of the International Court of Justice (1945 Art. 34(1)). However, as far back as 1907, individuals had standing before the Central American Court of Justice. See generally Alter (2006:22).

witnessed a fundamental shift. Individuals can now bring action against states, international organisations and their institutions under various treaties.[5]

An important issue for any private litigant is the enforcement of the resulting judgment. This is so whether he is litigating at the national or at the international level. A private litigant at the international level is generally not concerned about the principles of law used to adjudicate his dispute. Nor is he is very much concerned about the fact that those principles may become relevant in deciding future cases. He is often a very parochial actor and a pragmatist. He is more concerned with the judgment as a remedy and the material consequence of being granted such remedy.

However, the grant to individuals standing before international courts has not been matched by a clear articulation, in the realm of private and public international law, of how successful individuals may enforce judgments secured from these international courts. This is especially so when an individual wants to enforce the judgment before a national court. How does an individual in whose favour a pecuniary award has been made against a community institution or a state go about enforcing the judgment? Should he rely on the goodwill of the community to pay? Can he rely on his country of origin or residence to diplomatically assist him to recover the judgment debt?[6] Can he proceed to a national court and enforce the judgment debt as a foreign judgment? What about a judgment which orders a state or community institution to do something other than pay money (non-monetary judgments), for example, an order to release goods unlawfully seized or person unlawfully detained in breach of community law? Can such non-monetary judgments be enforced as easily as monetary judgments? These are not academic questions. In Africa, developments surrounding recent attempts – which are discussed below – to enforce judgments of the

[5] See e.g. the COMESA Treaty 1993: Art. 26; the SADC Tribunal Protocol 2000: Art.15(1)(2)]; the EAC Treaty 1999: Art. 30; the ECOWAS Court Protocol 1991:Art.10].

[6] See Roothman v President of the Republic of South Africa (2006). In this case the applicant sought the aid of the South African government to enforce a judgment on its behalf. The applicant obtained a judgment against the Democratic Republic of Congo (DRC) in an action in South Africa in which the DRC submitted to jurisdiction. The applicant was unable to obtain full satisfaction of the judgment debt either within or outside South Africa. The applicant relied on various constitutional arguments, including the right of access to justice, the rule of law, and the duty of the state to ensure the effectiveness of its courts and to assist its citizens to enforce their rights, and sought a declaratory order that the state takes reasonable steps to assist him to ensure compliance with the judgment. The respondent argued that the matter was governed by the private international law regime on the enforcement of foreign judgments, and it was from that regime that the applicant should seek remedy. The court held that the state has created mechanisms for enforcing judgments against commercial creditors. There was no reason for the state to take additional steps in cases involving a commercial contract between a citizen and a foreign state. Thus, there was no duty on the state to intercede on the applicant's behalf.

SADC Tribunal in various national courts and the difficulties encountered in the process make addressing these questions of more than theoretical importance.

Historically, various mechanisms have been used to enforce judgments of international courts. They include the use of international non-judicial institutions, self-help and diplomatic negotiations. Under Article 94(2) of the United Nations Charter enforcement of judgments of the International Court of Justice (ICJ) falls within the jurisdiction of the Security Council. It provides: 'If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'. Similarly, under Article 46(4) of the Statute on the African Court of Justice and Human Rights,[7] 'where a party has failed to comply with a judgment, the Court shall refer the matter to the [Assembly of Heads of State and Government], which shall decide upon measures to be taken to give effect to that judgment'. Thus, the Statute does not envisage using national courts to enforce judgments of the African Court of Justice and Human Rights; that is the responsibility of the Assembly of Heads of State and Government. Self-help can take many forms, including confiscation of assets, economic sanctions and military action. It is also often the case that when an international court comes out with a decision the parties enter into negotiations on how to implement the decision.

Generally, these mechanisms were devised at a time when the individual had no *locus standi* before international courts. It was reasoned that 'the function of enforcing a decision of an international tribunal is an executive function, and as such should be confined, in the ordinary case at any rate, to a body which is invested with executive powers. It becomes in any event, *a political as distinguished from a judicial matter*' (Hudson 1944:128). To Rosenne (1957:102), 'in international law the separation of the adjudicative from the post-adjudicative phase is a fundamental postulate of the whole theory of judicial settlement … this leads to the consequence that enforcement partakes of the quality of an entirely new dispute to be regulated *by political means'*. These observations suggest that international law did not contemplate direct enforcement of the decisions of international courts by national courts. Rather, it contemplates enforcement through diplomatic or political means. Even though it

[7] The Protocol on the Statute of the African Court of Justice and Human Rights (2008), which is currently not in force, merges the African Court for Human and Peoples' Right and the Court of Justice of the African Union.

has its defects, as between states, such an enforcement mechanism, which is power-oriented, is unproblematic. Studies have shown good compliance rates as regards decisions and recommendations of the ICJ and the World Trade Organisation (WTO) panels and Appellate Body, all of which are forums for inter-state (as opposed to individual-state) dispute settlement.[8] As between an individual and a state or international institution judgment debtor, the absence of a rule-orientated enforcement mechanism can be disadvantageous.[9]

In the few cases in which individuals have sought to enforce judgments of international courts in national courts, national courts have been reluctant to recognise and/or enforce such judgments. In Socobel v. Greek State (1951), a company sought to enforce a judgment of the Permanent Court of International Justice before a Belgian national court. The action failed because the company was not, and indeed, could not have been, a party to the action before the Permanent Court. To the Belgian court, it was inconceivable that, 'a party which, by definition, was not admitted to the bar of an international court should be able to rely on a decision in a case to which it was not a party'.[10] More recently, the Supreme Court of the United States (US) held that a judgment of the ICJ was not directly enforceable as domestic law and could therefore not prevail over state procedural rules.[11] Like *Socobel*, this action was instituted by an individual who was not, and could not have been, a party to the ICJ proceedings. It is open to question whether both judgments would have been different had the international judgments been issues as a result of actions instituted directly by the individual applicants.

Notwithstanding national courts' reluctance to enforce decisions of international courts at the instance of individuals, it has long been recognised that diplomatic protection is ineffective or often inaccessible to individuals who seek to rely on or enforce judgments of international courts. Accordingly, some commentators have advocated using national courts

[8] See Paulson (2004: 434); Schulte (2004); Davey (2009: 119).
[9] Comparatively, a study on compliance with decisions of the African Commission on Human and Peoples' Rights – a forum for individual state litigation – showed very minimal compliance rate. Viljoen & Louw (2007). See also OPEN SOCIETY JUSTICE INITIATIVE (2010). They conclude in this study that an implementation crisis currently afflicts the regional and international legal bodies charged with protecting human rights.
[10] Socobel v Greek State (1951) at 5. See also Committee of United States Citizens Living in Nicaragua v Ronald Wilson Reagan (1988).
[11] See Medellin . Texas (2008); Breard v Greene (1998); Sanchez-Llamas v Oregon (2006). But see also Hombre Sobrido v The French State2000) and Merce Pesca Company v The French State (2000).

to enforce judgments of international courts.[12] Reisman argued for an enhanced role for national courts in enforcing the judgments of the ICJ (Reisman 1969: 25). He proposed a *Draft Protocol for the Enforcement of I.C.J. Judgments.* Signatories to this protocol were to undertake 'to enact such internal legislation as is necessary to require domestic courts and tribunals to enforce international judgments, and rights arising thereon, solely and exclusively upon certification of the authenticity of said judgment' (Ibid.: 27). Schachter (1960:13) had earlier suggested that there seemed to be 'good reasons' for national courts to recognise international awards. Nantwi (1966:145) left open the possibility of using national courts to enforce judgments of international courts, and noted that 'the special circumstances of any particular case' may merit this. Jenks (1964: 681-682, 706-715) also discussed the possibility that specific judgments of international courts may be treated as equivalent to a foreign judgment and enforceable by municipal procedures available for the enforcement of such foreign judgments.

These suggestions have now found their way into treaties. Some of Africa's economic integration treaties contain provisions that seek to use national courts to enforce judgments of their respective community courts. Article 44 of the EAC Treaty provides that 'the execution of a judgment of the [EAC court] which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the Partner State in which the execution is to take place'. Similar provisions are found in the Economic Community of West African States (ECOWAS) and Common Market for Eastern and Southern Africa (COMESA) treaties and the SADC Tribunal Protocol.[13] There are two notable differences in the provisions. Firstly, while the EAC and COMESA provisions refer to judgments which impose 'a pecuniary obligation', the ECOWAS Court Protocol and SADC Tribunal Protocol refer to 'any judgments' and 'judgment' respectively. In other words, the EAC and COMESA provisions are restricted to enforcement of only monetary judgments, while the ECOWAS and SADC provisions encompass both monetary and non-monetary judgments. For individuals litigating before community courts, this is significant as some community judgments are likely to be non-monetary judgments. Secondly, it appears that national courts in COMESA and the EAC have the discretion to enforce such

[12] See O'Connell (1990: 891); Reilly and Ordonez (1995-1996: 435); Reisman (1969); Schachter (1960); Schreuer (1975: 153); Sagay (1972:600). .

[13] See the COMESA Treaty, Art. 40; ECOWAS Court Protocol, Art. 24(2); SADC Tribunal Protocol, Art. 32(1)(2)(3). See also Treaty on the Harmonization of Business Law in Africa (1997 Art. 25). These provisions can be traced to Article 92 of the Treaty establishing the European Coal and Steel Community (1951) of the Treaty establishing the European Economic Community (1957) (now Article 299 of the Consolidated Version of the Treaty on the Functioning of the European Union (2007), (2010) and Article 164 of the Treaty establishing the European Atomic Energy Community (1957).

judgments. Under the ECOWAS Court Protocol, enforcement, which is to be made by a designated competent national authority, is mandatory.

The significance of using national courts to enforce international judgments cannot be underestimated. It is perhaps the most potentially effective means for securing compliance with decisions of international courts and enhancing the effectiveness of international adjudication. National courts contribute to international rule of law and strengthening the status of international law in national legal systems. Also, using national courts to enforce international judgments enhances individual rights by depoliticising the post adjudicative phase of international litigation. Furthermore, the provisions which seek to adopt national rules for enforcing foreign judgments to enforce the judgments of community courts provide a means of linking community and national legal systems. They aim at integrating community and national judicial structures, and offer an opportunity for cooperation and dialogue between them. This opportunity should be explored to enhance economic integration in their respective sub regions. For individuals, these provisions represent a positive change in the direction of international law. The post adjudicative phase of litigation before international courts is often politicised. Inherent in the traditional international law enforcement mechanisms are elements of power relations that weigh heavily against individual judgment creditors. Although it has its own challenges, enforcement through national courts is rule-oriented, and can therefore be beneficial to individuals. Subject to the need for assets of the state judgment debtor within the state where enforcement is sought, national courts are easily accessible and their processes can be invoked directly by individuals and without the need for state intervention or consent.

Until recently, the provisions which seek to use national courts to enforce community judgments remained untested in Africa. This was so even though there have been a few instances in which the community courts have made pecuniary awards in favour of individuals. For example, in Muleya v Common Market for Eastern and Southern Africa (2004), the COMESA court awarded damages of $2000 against the respondent for publishing defamatory matter about the applicant. In Manneh v The Gambia (2008) the ECOWAS court also award damages of $100,000 in favour of an applicant, a journalist who was unlawfully detained by the Gambian government, and compensation of CFA fr. 100,000 in favour of an applicant who was adjudged to have been enslaved in Niger (Mme Hadijatou Mani Koraou v. The Republic of Niger 2008).

In 2010, the High Courts of Zimbabwe and South Africa decided two separate applications that were made to register and enforce judgments of the SADC Tribunal (Gramara (Private) Ltd. v Government of the Republic of Zimbabwe 2010 and Fick v Government of the Republic of Zimbabwe 2010). In Mike Campbell (Pvt) Ltd. v The Republic of Zimbabwe (2008),[14] the applicants challenged aspects of Zimbabwe's agricultural land reform policy as inconsistent with the SADC Treaty. The Tribunal found the respondent in breach of its obligations under the SADC Treaty. It ordered that the respondent take all necessary measures to protect the possession, occupation and ownership of the lands of the applicants and to take all appropriate measures to ensure that no action is taken to evict from, or interfere with, the peaceful residence on, and of those farms by the applicants. It further ordered the respondent to pay fair compensation to the applicants. It was these orders which the applicants sought to enforce in Zimbabwe and South Africa.

The High Court of Zimbabwe declined to register the Tribunal's judgment. The court held that it is generally not contrary to Zimbabwe's public policy to enforce judgements of the Tribunal because Zimbabwe was under an international obligation to do so. However, in the instant case, the legal and practical consequences of recognising and enforcing the Tribunal's judgment were such that the court should refuse to register it. The court reasoned that, legally, the land reform programme had been mandated by the Zimbabwean Constitution, and its constitutionality was upheld by the Supreme Court of Zimbabwe. Practically, registering the Tribunal's judgment would compel the Zimbabwean government to act contrary to the law parliament had enacted. Also it would necessitate the government having to reverse all the land acquisitions that had taken place since 2000 under the policy, with all the ramifications. In contrast, the High Court of South Africa, in a short judgment which contained no reasons registered the Tribunal's judgment.[15] The absence of detailed reasoning for the decision of the South African court (which in itself is problematic given the significance of the case) makes any attempt to analyse or criticise the judgment difficult. However, these opposing judgments from Zimbabwean and South African courts expose

[14] For a comprehensive account on the background to this case and judgments, see Naldi (2009); Hemel and Schalkwyk (2010).

[15] The substance of the judgment read: 'HAVING HEARD counsel(s) for the party (ies) and having read the documents files of record IT IS ORDERED THAT the rulings by the South African Development Community (SADC) Tribunal delivered on 28 November 2008 and 5 June 2009 are declared to be registered, i.e. recognised and enforceable in terms of Article 32 of the Protocol on the SADC Tribunal, by the High Court of South Africa, and the quantum of the costs pursuant to the latter ruling is declared to be as determined by the Registrar of the SADC Tribunal in the allocator, namely US$5 816.47 abd ZAR112 780.13'.

some of the challenges which individuals who obtain judgments from the community courts are likely to face when they seek to enforce the judgments.

3. Challenges of reliance on national courts

There are a number of challenges in trying to use national courts to enforce community judgments. Among the challenges are the following. Firstly, can the existing national common law and statute law regimes for the enforcement of foreign judgments be suitably adapted for the purpose of enforcing community judgments? Secondly, if they can be suitably adapted, can national courts review community judgments? Thirdly, will the use of civil procedure rules, which differ from country to country, afford equal or adequate protection to individual judgment creditors? If these challenges are not addressed, they may deny individuals the benefits of the judgments, and could also undermine the relations between national and community courts. In general, given the demands of economic integration, within which context community courts operate, and the international character of community judgments, the extant national regimes for enforcing of foreign judgments cannot, unthinkingly, be extended to community judgments.

This is a position that was realised at the time of the creation of the European Communities (now European Union). The founding treaties contained specific provisions that created a special regime for enforcing judgments of the Court of Justice of the European Union (ECJ) and other community institutions.[16] The provisions now find expression in Articles 280 and 299 of the Consolidated Version of the Treaty on the Functioning of the European Union (2007). They provide:

> Article 280
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> The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299.
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> Article 299
>
> Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable.

[16] See the Treaty establishing the European Coal and Steel Community (1951: Art. 192); Treaty establishing the European Economic Community (1957: Art. 192) (now Art. 299 of the Consolidated Version of the Treaty on the Functioning of the European Union (2007), (2010); Treaty establishing the European Atomic Energy Community (1957 Art 164).

> Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice of the European Union.
>
> When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.
>
> Enforcement may be suspended only by a decision of the Court. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

Even though some member states of the EU have enacted legislation creating special regimes for enforcing judgments of the ECJ and other EU institutions[17] – an express admission that the regime for enforcing foreign judgments is inadequate for this purpose – there is very little reported case law on their operation. Article 280 and 299 and their predecessors do not appear to have been subjected to interpretation by the ECJ. Indeed, the regimes' operation does not appear to have been comprehensively examined from an academic perspective.[18]

The effective enforcement of community judgments will demand review of national laws. For example, it is envisaged, under Rule 41(4) of the Rules of the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA Court Rules) (2003), that penalties imposed on non-attending witnesses will be enforced by national courts under the provision of Article 40 of the COMESA Treaty. This may, however, not be possible in some COMESA countries. Under both the common law and statute law, the court will not enforce

[17] See e.g. United Kingdom: European Communities (Enforcement of Community Judgments) (1972); Ireland: European Communities (Enforcement of Community Judgments, Orders and Decisions) (2007); Malta: European Communities (Enforcement of Community Judgments) (2007); Gibraltar: Judgments (European Community)(Enforcement) Act (1973).

[18] In the chapters on enforcement of judgments, leading English treatise on private international law devote less than a page to the subject. See e.g. Collins (2006: 679-680); Fawcett and Carruthers (2008: 587); Hill and Chong (2010: 491). For a more detailed discussion see Smit et al. (2010: Articles 280 and 299).

a judgment which is a penalty.[19] Thus, the effective implementation of this Rule, which is essential for the administration of justice within the COMESA, will demand changes in the laws of some member states.

The use of national courts to enforce community judgments also raises questions as to the relations between community and national courts: what limitations exist on the constitutionally-conferred jurisdictional powers of national courts when it comes to enforcing community judgments? Can national courts review those judgments, set them aside or modify them? So far, there appear to be no answers to these questions. Although it did not involve a review of the SADC Tribunal's judgment, the decision of the Zimbabwe High Court not to enforce the Tribunal's judgement on the ground that enforcement will, *inter alia*, be inconsistent with a decision of the Supreme Court of Zimbabwe provides a concrete illustration of a national court refusing to enforce a community decision on the basis of national law (Gramara (Private) Ltd. v. Government of the Republic of Zimbabwe 2010). National courts are slow to review foreign judgments, but the power to review remains, especially where there is allegation of fraud. If national courts review community judgments, it will undermine the administration of justice within the communities, and render the communities' legal systems subject to the varying demands of member states' laws. On the other hand, it can be argued that review by national courts introduces a measure of accountability in international adjudication. However, in the context of economic integration, it is likely that the destabilising effect of such national judicial reviews will far outweigh the benefits of accountability. Accordingly, it is proposed that, firstly, in the context of economic integration, national courts in Africa should not have the power to review or invalidate community judgments. Secondly, national courts should not have jurisdiction to decline to enforce community judgments. This is especially so when the applicable law for such a decision will, as in *Gramara (Private) Ltd*, be national law.

The former proposition finds support in international law. In the Chorzow Factory (1928: 33) case, the Permanent Court of International Justice held that a national court did not have the power to invalidate an international judgment. Both propositions are also consistent with the view that the community legal system should not be subjected to national legal systems. Admittedly, both propositions offend the long-established discretion in national courts to

[19] See e.g. Kenya: Foreign Judgment (Reciprocal Enforcement) Act 1984 sec. 3(b); Zimbabwe: Civil Matters (Mutual Assistance) Act 1995 sec. 6(h)(ii).

enforce foreign judgments. They also challenge national constitutions which make the judiciary the ultimate source of judicial power. To grant community judgments this privileged status will require amendment of national laws. At the community level, the acceptance of these propositions will demand greater responsibility from community courts to ensure the integrity of the processes that result in their judgments. This will make up for the proposed absence of discretion in national courts to decline to enforce these judgments.

Another drawback in using the existing national regimes to enforce community judgments is that some do not provide for the enforcement of non-monetary judgments. However, in the context of economic integration, non-monetary judgments are more likely to be a major component of community judgments. There is a movement in some countries towards enforcing foreign non-monetary judgments.[20] With the exception of South Africa, which is currently considering proposals to enforce non-monetary judgments, Africa remains largely insulated from this movement.[21] In Gramara (Private) Ltd (2010), one of the arguments against the enforcement of the SADC Tribunal's judgment was that aspects of it entailed administrative consequences and was not for the payment of a fixed sum of money. The High Court held that it would be 'contrary to principle to restrict the scope of recognition proceedings by reference to the specific remedies enjoined by a given foreign judgment'. In other words, the mere fact that a judgment of a community court did not entail the payment of money should not automatically lead a national court to dismiss an application to enforce it. This is an important pronouncement given that some judgments of the community courts are likely to be of a non-pecuniary character.

Most community judgments will probably be against sovereign states. It is therefore troubling that the treaties are silent on the issue of state immunity from enforcement actions at the national level. States often enjoy exemption from execution against their assets in their own territory or elsewhere. Thus, national law on this issue will be highly relevant regarding enforcement actions brought by individual judgment creditors. A successful claim of immunity from execution will rob an individual of the benefits of a community judgment.

[20] See Pro Swing Inc. v Elta Golf Inc. (2007); Brunei Investment agency v Fidelis Nominees Ltd. (2008); Miller v. Gianne (2007). See generally Oppong (2006: 276-282).
[21] See South African Law Reform Commission (2006: 4.2.17-4.2.25.

Although there has been a perceptible trend towards restrictive state immunity, it still remains a formidable challenge.[22]

The above has assumed that the provisions in the community treaties which seek to use national courts to enforce community judgments are binding on national courts. However, the absence of domestic legislation, especially in dualist countries implementing the community treaties[23] raises questions as to the binding effect of the provisions. A treaty is not effective within a state unless implemented by domestic legislation. Without domestic legislation, courts may be incompetent to give effect to the provisions and use them as the basis to enforce community judgments. From a comparative perspective, this problem appears to have been explicitly acknowledged by the drafters of Article 26 of the Agreement establishing the Caribbean Court of Justice (2001). Accordingly, they provided: 'The Contracting Parties agree to take all the necessary steps, *including the enactment of legislation* to ensure that … any judgment, decree, order or sentence of the Court given in the exercise of its jurisdiction shall be enforced by all courts and authorities in any territory of the Contracting Parties as if it were a judgment, decree, order or sentence of a superior court of that Contracting Party'. Reisman's *Draft Protocol for the Enforcement of I.C.J. Judgments* (Reisman: 1969) also suggested the need to enact 'internal legislation'. It is unfortunate that the community treaties do not recognise, or at least are silent, on the need for domestic legislation, especially on this issue. To my knowledge, no African country has as yet enacted legislation on the enforcement of community judgments.

In Gramara (Private) Ltd (2010), the court rightly noted that Zimbabwe had not taken any specific internal measures to domesticate the SADC Treaty or the Protocol of the Tribunal. More specifically, no legislative or administrative steps had been taken to implement Zimbabwe's obligations under Article 32 – the provision calling for the use of national civil procedures to enforce the Tribunal's judgment – or to transform those obligations into effectual provisions of the municipal law. Rather than address this prior and important question, the court appeared to have wrongly assumed that the mere fact that Zimbabwe is subject to the jurisdiction of the Tribunal (by virtue of the fact that it ratified the Treaty, which then binds it in international law) gives it jurisdiction to hear the application to

[22] See generally Ostrander (2004: 540); Crawford (1981: 820).
[23] The exception is the EAC Treaty which has been given the force of law in Kenya, Uganda and Tanzania. See Tanzania: Treaty for the Establishment of East African Community Act, 2001, (Act No. 4); Kenya: Treaty for the Establishment of East African Community Act, 2000, (Act No. 2); Uganda: East African Community Act, 2002.

enforce the Tribunal's judgment. Comity provides the basis for enforcing foreign judgments. However, it is suggested that it cannot provide the basis for enforcing community judgments in national courts. This proposition may appear unconvincing on first reading, as it can be argued that whatever arrangement governs the output of another state's judiciary should apply to a judiciary operating on behalf of a number of states, i.e. a community court. However, it is worth noting that a judgment of a community court is, in a sense, international law. Even though here we are looking at the judgment as a remedy (e.g. damages, compensation, restitution, injunctions and declarations of right) as opposed to a judgment as principles of law, it is undeniable that the remedy is a right – akin to a human right – created by international law. By assuming jurisdiction to enforce it and enforcing it on the basis of comity rather than an express national legislation, a national court will be circumventing national constitutional provisions on the reception of international law.

A characteristic of many African constitutions is that they clearly outline their vision of the relations between international and national law. This vision will directly affect enforcement of community judgments in national courts. Traditionally, the relationship between national and international is discussed from monist-dualist perspectives (Nollkaemper and Nijman 2007; Brownlie, 2003: 31-53; Aust 2007: 178-199). Monism has its root in natural law theories which see all law as the product of reason. It envisions international law as automatically being part of national legal systems. The foundation of dualism is in legal positivism. It posits that international and national laws operate on separate legal planes: international law governs relations between states, and national law regulates relations between individuals and the state. Under dualism, international law can play no role in the national legal systems except in so far as it has been received or adopted by them. The monism-dualist paradigm has been a target for trenchant academic criticism, but it is still useful for understanding how states implement international law, especially treaties. This is especially so if, in approaching the paradigm, we appreciate that what really matters is not the doctrinal debate but rather the actual practices of states.

African constitutions reflect the monist-dualist perspectives (Oppong 2007; Maluwa 1998; Adede 1999; Tshosa 2007 and 2010:). There are other constitutional provisions that appear to merge aspects of both perspectives.[24] Generally, the former British colonies have

[24] See the Constitution of the Republic of Burundi 2004, Art. 292; Constitution of the Republic of Cape Verde 1992, Art. 11; Constitution of the Federal Democratic Republic of Ethiopia 1995, Art. 9(4); Constitution of the Republic of Gabon 1991, Art. 114; Constitution of the Republic of Namibia 1990, Art. 144.

provisions that tend towards dualism; international law does not have the force of law in the Commonwealth countries unless it has been expressly given that force by a national measure, usually an Act of Parliament.[25] Many other African countries, most of them former French colonies, have constitutional provisions that adopt the monist perspective. Their provisions are modelled on Article 55 of the French Constitution of 1958. In general, they provide that treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of domestic legislation, subject, for each agreement or treaty, to application by the other party.[26] A national court, such as the South African High Court, which gives effect to a community judgment without regard to these international law implementation provisions, arguably, acts unconstitutionally (Medellin v. Texas 2008).

In the opinion of this writer, legislation which gives national courts jurisdiction to enforce community judgments and deals with other issues attendant with the exercise of that jurisdiction is particularly important. Enforcement of a community judgment raises issues which are not present with a foreign judgment for which the existing national regimes have been designed. Unlike a foreign judgment, which has its sole source in a foreign state, a community judgment may actually be a 'review' of an earlier decision of a court of the country in which the enforcement is sought. Ordinarily, this would be a conflicting judgment and, therefore, unenforceable. Let us assume, after exhausting local remedies, that an individual proceeds to a community court. He obtains a judgment contrary to that of national courts that the individual has 'exhausted'. His attempt to enforce the community judgments may meet significant challenges.

Firstly, a national court will be reluctant to enforce a judgment which contradicts its own judgment, and, even more so, if the first judgment was from a superior court in that country. At present there are no constitutionally mandated hierarchical or horizontal relations

[25] See the Constitution of the Republic of Ghana 1992, Art. 75; Constitution of the Republic of South Africa 1998, Art. 231; Constitution of the Republic of Malawi 1994, Art. 211; Constitution of the Republic of Uganda 1995, Art. 123; Constitution of the Federal Republic of Nigeria 1999, Art. 12; Constitution of the Republic of Zimbabwe 1979, Art. 111B; Constitution of the Kingdom of Swaziland, Art. 238(4); Namibia Constitution, arts. 32(3)(e) and 63(2)(e); Constitution of the Republic of Seychelles, 1993, Art. 64(3)(4)(5).

[26] See the Constitution of Burkina Faso 1991, Art. 151; Constitution of Cameroon 1996, Art. 45; Constitution of Mali 1992, Art. 116; Constitution of the Republic of Benin, Art. 147; Constitution of the Republic of Algeria, Art. 132; Central African Republic Constitution 2004, Art. 72; Chad Constitution 1996, Art. 222; Constitution of the Federal Islamic Republic of the Comoros 1996, Art. 18; Constitution of the Democratic Republic of the Congo 2005, Art. 215; Constitution of the Republic of the Congo 2002, Art. 185; Cote d'Ivoire Constitution, Art. 87; Constitution of the Republic of Guinea 1990, Art. 79; Constitution of Republic of Madagascar 1998, Art. 82.3(VIII); Constitution of the Islamic Republic of Mauritania 1991, Art. 80; Niger Constitution, Art. 132; Constitution of the Republic of Senegal 2001, Art. 98; Constitution of the Republic of Rwanda 2003, Art. 190.

between national and community courts. The community courts exist outside national judicial structures. As the Zimbabwean Supreme Court ominously observed, 'the SADC Tribunal has not been domesticated by any municipal law and therefore enjoys no legal status in Zimbabwe. I believe the same obtains in all SADC States, that is, that there is no right of appeal from the South African Constitutional Court, the Namibian Supreme Court, the Lesotho Supreme Court, the Swaziland Supreme Court, the Zambian Supreme Court and the Supreme Courts of other SADC countries to the SADC Tribunal' (Commercial Farmers Union v The Minister of Lands and Rural Resettlement 2010).[27] Without legislation, a national court is not bound by decisions of any community court no matter how exalted the community court is.

Secondly, from the above illustration, the community judgment will, in principle, be a review of earlier decisions of national courts. In some countries, this will raise a constitutional question as to the *locus* of final judicial power. Under Article 125(3) of the Constitution of the Republic of Ghana, the judicial power of Ghana shall be vested in the Judiciary and neither 'the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power'.[28] Ordinarily, this is a classic separation of powers provision. However, when read in the context of international adjudication and its effect on states, it is debatable whether it would be constitutional to give the ECOWAS court final judicial power in Ghana, even if that power was restricted to defined matters. In the absence of a specific constitutional provision, which makes community law supreme over domestic law, transfers some of the powers excercised by states powers to the community, or legislation to regulate enforcement in such cases, enforcing a community judgment could amount to an unconstitutional subjection of Ghana's legal systems to the community legal system.

The above exposition reveals that the proposed use of national courts to enforce community judgments is riddled with problems. So far, these problems have not been carefully thought through, let alone resolved. Member states of the communities should examine these problems and legislate to resolve them. There is the need for community input here to ensure that community judgments are not subjected to varying national laws,

[27] Another interesting case in this respect is the Kenyan case of Joseph Kimani Gathungu v Attorney General (2010) in which the issue of the role of the International Criminal Court in Kenya's judicial set-up was discussed.

[28] See Constitution of the Republic of Sierra Leone 1991, Art. 120; Constitution of the Republic of South Africa 1998, Art. 165.

which might result in accordingly dissimilar effect to community judgments. For example, as regards pecuniary judgments, national law may vary on issues such as prescription, the currency in which the obligation may be discharged, and the mode of calculating interest on the judgment. Indeed, what is needed is detailed and well-considered community law setting out the legal framework for enforcing community judgments in member states' national courts. Simply providing that the execution of community judgments shall be governed by the rules of civil procedure in force in the member state in which enforcement is sought is not enough.

Various reasons have been given for noncompliance with community judgments, including arguments about national sovereignty, absence of strong economic interdependence among African countries, and a preference for negotiation instead of adjudication (Kufuor 1996:6-11). Whether the use of national courts to enforce community judgments will assist individuals to overcome or bypass these argument remains to be seen but it offers a better prospect than enforcement through political and diplomatic processes. There have been three instances in which Zimbabwe has been referred to the SADC Summit of Heads of State and Government for its noncompliance with decisions of the SADC Tribunal. To date, no such action appears to have been taken. It is unlikely that a decision of a national court to enforce the decision of the Tribunal in a member country would have been met with the same degree of inertia. Indeed, following the decision of the South African High Court to register the Tribunal's judgment, it has been reported that the judgment creditors have attached some assets of Zimbabwe in South Africa.

In conclusion, it has been argued above that the existing state of national laws is inadequate to meet the community treaties' demand that national civil procedure rules on enforcement of foreign judgments be used to enforce judgments of the community courts. Appendix I provides model legislation on the enforcement of judgments of community courts that could overcome some of the challenges identified above. It is the sincere hope of this writer that African governments will enact laws to facilitate enforcement of judgments of the community courts, which have been established and operating, in national courts.

Appendix I

Enforcement of Community Judgments Act

1. Short title

This Act may be cited as the [*insert name of community*] (Enforcement of Community Judgments) Act.

2. Interpretation

In this Act —

"Community" means [*insert name of community*].

"Community court" means [*insert name of community court or tribunal*].

"Community judgment" means any decision, judgment, order or arbitration award that is enforceable under or in accordance with [*article 40 of the Treaty establishing the Common Market of Eastern and Southern Africa*] [*Article 24 of the Protocol on the Court of Justice of the Economic Community of West African States*] [*Article 44 of the Treaty establishing the East African Community*] [*Article 32 of the Protocol on Tribunal and Rules of Procedure thereof of the Treaty establishing the Southern African Development Community*].

"Registration order" means an order made by the High Court under section 3(1) of this Act.

"Treaty" means [*insert title of community constitutive treaty*].

3. Registration Orders for Community Judgments

(1) The High Court shall, upon application duly made at any time for the purpose by the person entitled to enforce it, forthwith, make an order permitting the registration of a Community judgment.

(2) An application to the High Court for a registration order may be made without notice.

(3) An application for a registration order must be supported by an authenticated copy of the Community judgment for which the registration order is sought.

(4) Where the Community judgment is not in [*insert official language of the High Court*], a translation of it into [*insert official language of the High Court*] shall be provided by the person

seeking the registration order. The translated copy must be certified by a public notary or other qualified person; or accompanied by written evidence confirming that the translation is accurate.

(5) Where the application for a registration order is for a Community judgment that is a monetary judgment, the application must state –

(a) the name of the judgment creditor and his address for service within the jurisdiction;

(b) the name of the judgment debtor and his address or place of business, if known; and

(c) the amount in respect of which the judgment is unsatisfied.

(6) Where it appears that a Community judgment, under which a sum of money is payable, has been partly satisfied at the date of the application for a registration order, the order shall be made only in respect of the balance remaining payable at that date.

4. Challenging Registration Orders

(1) A copy of the registration order must be served on every person against whom the Community judgment was given.

(2) The registration order must state the name and address for service of the person who applied for registration, and must exhibit a copy of the Community judgment for which the registration order was made.

(3) The registration order must also state the right of the person against whom the order was made to apply within 28 days for the variation, suspension or cancellation of the order.

(4) An application for a variation, suspension or cancellation of a registration order shall be made within 28 days of the date on which the registration order was served on the person against whom it was made, and it shall state the grounds for the application.

(5) A registration order may be varied, suspended or cancelled, as the case may be on the ground that:

(a) the Community judgment has been wholly of partly satisfied;

(b) the applicant intended to challenge the Community judgment using the procedures set out in the Treaty, and has in fact taken material steps in that direction; or

(c) the Community court has varied, cancelled or suspended the Community judgment.

(6) The person against whom a registration order is made must satisfy the court on the balance of probabilities that one or more of the grounds stated in section 4(5) exist. For the avoidance of doubt, there shall be no other basis for varying, cancelling or suspending a Community judgment.

(7) The High Court may, in the case of a Community judgment, which is not a monetary judgment, dispense with the requirement for notice under section 4(1) or stipulate a duration shorter than that provided under section 4(3) within which the person against whom a registration order has been made can apply for its variation, cancellation or suspension.

5. No Review on the Merits

In proceedings under this Act the High Court shall not enter into the merits of the Community judgment.

6. Registration of Community Judgment

(1) Where a person against whom a registration order is made fails to satisfy the court under section 4(6) or fails to apply for a variation, cancellation or suspension of the registration order under section 4(4), the High Court shall forthwith register the judgment and issue an order for its enforcement.

(2) A Community judgment that is a monetary judgment shall be registered and enforced in the currency in which it is expressed.

7. Effect of Registration of Community Judgment

1. A Community judgment registered in accordance with Article 6(1) shall, for all purposes of execution, be of the same force and effect, and proceedings may be taken on the judgment as if the judgment had been a judgment or order given or made by the High Court on the date of registration.

3. Unless otherwise provided in the Community judgment, any sum payable under the Community judgment shall carry interest from the date on which the Community judgment was made, and at such rate as if the Community judgment, order or decision had been a judgment or order given or made by the High Court.

2. The High Court shall have jurisdiction over complaints that enforcement of a Community judgment is being carried out in an irregular manner.

8. Immunity

1. A state shall not enjoy immunity from jurisdiction in an action to enforce a Community judgment

2. Without prejudice to section 8(1), nothing in this Act shall be construed as derogating from the law of [*insert name of country*] relating to immunity of that State or of any foreign State from execution.

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