

# NOTES

## Review of the role, functions and terms of reference of the SADC Tribunal

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### Background

The SADC Tribunal has on various occasions found that the Government of Zimbabwe is in breach and contempt of the previous orders of the court.<sup>1</sup> In August 2009, the Zimbabwean Government issued a legal opinion which challenged the legality of the Southern African Development Community (SADC) Tribunal and disputed its power to enforce decisions. Furthermore, the Zimbabwean Government announced its withdrawal from any legal proceedings involving the Tribunal until the Protocol on Tribunal and the Rules of Procedure Thereof (*Tribunal Protocol*) was ratified by at least two-thirds of the bloc's membership. Hence, the SADC Council of Ministers recommended the review of the role, functions and terms of reference of the Tribunal. Thus, the communiqué of the 30th Jubilee Summit of SADC Heads of State and Government announced the Summit's decision that a review of the role, functions and terms of reference of the SADC Tribunal should be undertaken and concluded within six months. Furthermore, the Summit did not renew the tenure of office of five members whose terms had expired, and it did not replace them and Zimbabwe's withdrawn Member. This meant that the Tribunal would be unable to accept new cases since it did not comply with the requirements concerning the composition of the Tribunal in terms of Article 3 of the SADC Tribunal Protocol. The decision of the SADC Summit accordingly constituted a suspension of the Tribunal's operation.

### Scope of the study

On 9 September 2010, the SADC Secretariat commissioned a study on the review of the role, responsibilities and terms of reference of the SADC Tribunal

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1 *Mike Campbell (Pty) Limited & Others v The Republic of Zimbabwe*, SADC (T) 11/2008; *William Michael Campbell & Another v The Republic of Zimbabwe*, SADC (T) 03/2009.

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and invited consultants to submit proposals to conduct the study. The study was required to address –

- the jurisdiction of the Tribunal
- the interface between Community law and national laws in SADC
- the mandate of the existing appeals chamber of the Tribunal
- the recognition, enforcement and execution of the Tribunal's decisions
- the qualifications and the process of nomination and appointment of judges
- the lack of clarity in some provisions of the SADC Treaty and the Tribunal Protocol
- the tendency by member states to give primacy to domestic laws/ jurisdiction over SADC law, and
- the reluctance of member states to relinquish some aspects of their sovereignty to SADC.

It is accordingly the aim of this note to highlight briefly the substantive issues in the Tribunal Protocol that will be subjected to the review process. It is not the intention of the author to comment on these issues, but rather to present an exposition of them.

It is important to reflect on the legal status of the Tribunal Protocol and the Tribunal itself in the light of the concerns raised by Zimbabwe in this regard. It should also be borne in mind that the establishment of the Tribunal is not subject to the ratification of the Protocol, since Article 9(1)(f) of the SADC Treaty states that the Tribunal is “hereby established”. Thus, the Treaty has established the Tribunal and its decisions are final and binding in accordance with Article 16(5).

The Protocol regulates the operational matters provided for in Article 16(2) of the Treaty. Article 38 of the Tribunal Protocol, however, requires ratification by two-thirds of the member states prior to its entry into force. Furthermore, in 2001, the SADC Treaty was amended to make the SADC Tribunal an integral part of both the Treaty and the institution of SADC. Article 16(2) states that the –

... composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty.

Article 22 deals with issues such as the signature, ratification and entry into force of Protocols. It is, therefore, possible to argue that the Treaty has done away with the requirements in Article 38 of the Tribunal Protocol. However, the Treaty cannot determine a member state's constitutional ratification procedure, which is dependent on constitutional municipal law. In terms of section 111(B) of the Constitution of Zimbabwe, parliamentary approval as well as legal

enactment is required before a treaty becomes municipal law. This would imply that member states have obligations in terms of the Tribunal Protocol on the international plane, but fulfillment of constitutional requirements is required in order to ensure domestic application. Zimbabwe may not appeal to the fact that it has not complied with its constitutional ratification requirements as justification for non-compliance with the Tribunal Protocol.<sup>2</sup> The review, therefore, needs to clarify this complex issue.

Part III of the Tribunal Protocol contains provisions on the jurisdiction of the Tribunal. Article 14 stipulates that the Tribunal has jurisdiction concerning disputes based on SADC legal instruments and other agreements which confer jurisdiction on the Tribunal. In terms of Article 15, the Tribunal has jurisdiction over legal and natural persons and member states. Article 15(2) contains an exhaustion of local remedies rule, which pertains to persons. Furthermore, the Tribunal may make preliminary rulings upon request by domestic courts,<sup>3</sup> possesses advisory jurisdiction,<sup>4</sup> and functions as a labour tribunal.<sup>5</sup> The Tribunal also has an appellate function in relation, for instance, to the trade panels established in terms of Article 31(b) of the SADC Protocol on Trade.<sup>6</sup> In general, the jurisdiction provisions are similar to those of other international adjudicative bodies. Article 26 of the European Convention on Human Rights as well as article 50 of the African Charter on Human and Peoples' Rights also provide for the exhaustion of local remedies. In terms of Article 96 of the United Nations Charter, the International Court of Justice has advisory jurisdiction.

The relationship between international and municipal law is a complex issue. It should be borne in mind that it is the constitutional law of a state that determines the role of international law in a municipal legal system. The Zimbabwean Government, in the aforementioned *Campbell* case, relied on Section 16B of Amendment 17 of its municipal law to justify its non-compliance with international law. The latter approach contravenes Article 27 of the Vienna Convention on the Law of Treaties.

It is also important to clarify the relationship between municipal and Community law. Various issues arise in this context, such as –

- the effect of Tribunal decisions on municipal law
- the review of the decisions of municipal courts by the Tribunal, and
- the role of the Tribunal in guiding domestic courts on the application of Community law in terms of the preliminary procedure provided for in Article 16 of the Tribunal Protocol.

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2 Article 27, Vienna Convention on the Law of Treaties.

3 Article 16, Tribunal Protocol.

4 Article 20, Tribunal Protocol.

5 Article 19, Tribunal Protocol.

6 Articles 14(b) and 20A, Tribunal Protocol.

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Thus, the Zimbabwean High Court's refusal to register the decision of the SADC Tribunal<sup>7</sup> provides a good example of the relationship between municipal courts and the Tribunal and the relationship between municipal and SADC law. This issue also invokes the recognition and enforcement of the Tribunal's decisions through Article 32 of the Tribunal Protocol, which provides for a domestic civil law procedure governing the registration and enforcement of foreign judgments in the territory of the state in which the judgment is to be enforced. This enforcement mechanism was used in the North Gauteng High Court of South Africa, which was approached to register the decisions of the SADC Tribunal of 28 November 2008 and 5 June 2009.<sup>8</sup> The reaction of the Zimbabwean Government to the Tribunal's decision indicates the tendency by member states to give primacy to municipal law/jurisdiction over Community law. In this regard, Article 6(5) of the Treaty is instructive since it reads that "Member States shall take all necessary steps to accord this Treaty the force of national law".

Also, the enforcement mechanisms of the Tribunal may prove to be ineffective. In terms of Article 32(4) of the Tribunal Protocol, any party may refer to the Tribunal a state's non-compliance with a Tribunal decision. In accordance with subparagraph (5) of that Article, the Tribunal may report a finding of failure to comply with a Tribunal decision to the Summit "for the latter to take appropriate action". Article 33(1) of the Treaty states that appropriate action may be in the form of the imposition of sanctions against a member state which is in non-compliance. However, subparagraph (2) of the latter Article determines that the sanctions are not specified since it is the responsibility of the Summit to determine them on a case-by-case basis. This provision is an example of a matter on which the SADC instruments are unclear and deserve urgent attention and clarification. The non-specification of sanctions may create uncertainty and impede the imposition of punitive and/or other measures. The Summit is SADC's supreme policymaking body. It consists of the Heads of State or Government of all member states, and meets on an annual basis. The consensual nature of the decisions of the Summit may also present an obstacle to the imposition of such measures.<sup>9</sup>

In relation to the Tribunal's appeal chamber, it may be useful to explore the possibility of expanding the appellate jurisdiction in order to provide for a further instance of appeal in the context of the SADC legal regime.

The appointment of judges is also a very important issue, and reference to international practice may be useful here.

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7 *Gramara (Private) Limited & Colin Bailie Cloete v Government of the Republic of Zimbabwe & Attorney-General of Zimbabwe & Norman Kapanga*, HH-169 2009.

8 *Louis Karel Fick & Others v Government of the Republic of Zimbabwe*, Unreported Case No. 7781/2009 (NGHC), decided on 25 February 2010.

9 Article 10(8), Tribunal Protocol.

Lastly, the Zimbabwean Government's response following the above-mentioned *Campbell* case illustrates the reluctance of states to surrender some aspects of their sovereignty to SADC. The 'pooling of sovereignty' is important for regional integration, and states should be aware that sovereignty is not absolute: it has evolved in response to the needs of the international community.

The de facto suspension of the Tribunal subsequent to Zimbabwe's non-compliance with its orders creates the impression that SADC members are not committed to regional integration under the auspices of SADC. Conversely, the establishment by the same member states of an independent Tribunal with wide jurisdiction affirms that SADC is a system based on law and order and respect for the rule of law.

Shortly before this edition was printed, the Summit decided at an extraordinary session not to reappoint members of the Tribunal, whose terms of office expired in August 2010. The Summit further decided against the replacement of the current members of the Tribunal, whose terms expire in October 2011.<sup>10</sup> These decisions were taken after a review of the abovementioned study of the SADC Tribunal. However, it seems that the recommendations of the independent experts support the competence of the Tribunal to deal with the case against Zimbabwe. Furthermore, the Summit mandated the Ministers of Justice/Attorneys General to initiate a process aimed at amending the Tribunal Protocol, which would exclude the locus standi of SADC citizens.<sup>11</sup>

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10 <http://www.newera.com.na/article.php?articleid=38834&msg=error2&dbtype=New>; last accessed 23 May 2011.

11 <http://www.globalissues.org/news/2011/05/22/9750>; last accessed 23 May 2011.