

CASE REVIEWS

Barry Gondo & 8 Others v The Republic of Zimbabwe, SADC (T) 05/2008

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In this dispute, the Southern African Development Community (SADC) Tribunal was called upon to determine the compatibility of certain provisions of the respondent's national legislation with its obligation under the SADC Treaty.

The facts of the case are as follows. The applicants were victims of violence inflicted on them by the National Police and National Army of the Republic of Zimbabwe. The applicants sought remedies in the national courts of Zimbabwe and were successful in their claims. These courts awarded the applicants damages for the violence suffered at the hands of the respondent's security agents. However, the respondent failed to comply with the orders of its courts, and the applicants were unable to enforce the judgment because section 5(2) of the State Liability Act [Cap 8:14] prevented the execution of judgments against the respondent's property.

The applicants contended at the SADC Tribunal that section 5(2) of the said Act was incompatible with the respondent's obligation under Articles 4(c) and 6(1) of the SADC Treaty because the provisions of the said section 5(2) prevented the respondent from ensuring that effective remedies were available to the applicants. The applicants also contended that the respondent's failure to ensure the availability of effective remedies amounted to a breach of the principles of human rights provided for in Articles 4(c) and 6(1) of the SADC Treaty.

The applicants therefore sought three reliefs against the respondent. The reliefs were as follows:

- A declaration that the respondent was in breach of the SADC Treaty since it had failed to comply with the orders of its national courts
- A declaration that section 5(2) of the State Liability Act was in breach of the SADC Treaty in so far as it provided that state property could not form the subject matter of execution, attachment or process to satisfy a judgment debt, and
- Such further and alternative reliefs as the Tribunal might deem fit.

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In determining whether the respondent was in breach of the SADC Treaty, the Tribunal restated its position in *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe*¹ to the effect that Articles 4(c) and 6(1) of the SADC Treaty created an obligation on member states to respect, protect and promote human rights, democracy and the rule of law. The Tribunal held that the right to effective remedy was a fundamental right embraced by the concept of *rule of law*.² In other words, where a state failed to provide effective remedies, it breached its obligation to uphold the rule of law. Relying on the provisions of the International Covenant on Civil and Political Rights (ICCPR), the Tribunal held that the provisions of Article 2(3) of the ICCPR, when read in conjunction with its Article 5, prohibited any legislation or conduct which might render remedies ineffective, might obstruct the implementation of judicial remedies, or might provide state immunity from the enforcement of court orders.³

Drawing from the jurisprudence of the European Court of Human Rights, the Constitutional Court of South Africa, the African Commission on Human and Peoples' Rights, and citing Article 7(1) of the African Charter on Human and Peoples' Rights, the Tribunal concluded that the respondent was in breach of its obligation under Articles 4(c) and 6(1) of the SADC Treaty. In arriving at its decision, the Tribunal was of the opinion that the respondents' failure to provide effective remedy amounted to a contravention of the fundamental human rights principles enunciated in the said Articles of the SADC Treaty.

In determining the effect of section 5(2) of the State Liability Act, the Tribunal pointed out that the Constitutional Court of South Africa had declared a similar provision unconstitutional in that it elevated the state above the law. The Tribunal also took into consideration the non-discriminatory provisions of Article 26 of the ICCPR and its interpretation by the Human Rights Committee in General Comment No. 18. The Tribunal opined that section 5(2) of the Act was discriminatory in terms of Article 26 of the ICCPR, because it treated judgment creditors who had obtained judgments against the respondent differently from creditors who had obtained judgment against private litigants. Therefore, the Tribunal stated that section 5(2) of the Act also contravened the principle of equality and equal protection enunciated in Article 3(1) and (2) of the ACHPR because it prevented the law from been equally enforced and did not accord equal protection to all parties. In this regard, the Tribunal found that section 5(2) of the Act was in breach of the respondents' obligation under

1 *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe*, SADC (T) 2/2007.

2 *Gondo*, p 4. The Tribunal identified other fundamental rights embraced by the rule of law concept to include the right of access to an independent and impartial court or tribunal; the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation; the right to equality before the law; and the right to equal protection by the law.

3 *Gondo*, p 5.

Articles 4(c) and 6(1) of the SADC Treaty, and that granting the state immunity from the execution of judgment debt had an adverse effect on the rule of law.

Having found that the respondent was in breach of its SADC Treaty obligations, the Tribunal proceeded to consider the revalorisation of the damages awarded to the applicant by the respondent's national courts. The application for revalorisation was based on the fact that the respondent's currency had depreciated over the years. In arriving at its decision to grant the applicants' request for revalorisation, the Tribunal relied on another decision by the South African courts⁴ and, most importantly, on Article 12(h) of the SADC Charter of Fundamental Social Rights. The Tribunal held the view that the Charter of Fundamental Social Rights provided for revalorisation in that it allowed for adequate inflation-adjusted compensation. As such, the Tribunal found that the damages awarded the applicants needed to be revalorised in the interest of justice. However, the Tribunal left the process of adjustment to be mutually concluded by the respondent's and applicants' agents.

While the Tribunal's jurisdiction to resolve disputes that have a human rights component is not disputed, it is also important for the Tribunal to clarify and justify its application of human rights legislation that does not directly fall within the SADC body of laws. For example, the Tribunal concluded that section 5(2) of the State Liability Act was discriminatory in content under Article 26 of the ICCPR.⁵ The question that arises is whether a breach under the ICCPR necessarily incurs liability under the SADC regime, taking into consideration that the ICCPR has its own complaint mechanism. It is important for the Tribunal to clarify between instances when it uses other international instruments that do not form part of the body of SADC laws as interpretative tools, and instances when such instruments are employed as the basis for arriving at a decision. In the case of the latter, the Tribunal may have to justify the applicability of such international instruments – particularly where they are not part of customary international law.

The overall judgment in the *Gondo* case reflects the Tribunal's willingness to protect, at all costs, the fundamental human rights principles provided for in the SADC Treaty. To this end, the Tribunal was obliged to use other legislation not provided for within the SADC body of laws to interpret the respondent's human rights obligations under the SADC Treaty. There has been a great deal of debate as to the applicability of human rights instruments such as the African Charter on Human and Peoples' Rights by the SADC Tribunal. These debates will continue to exist, particularly where a member state tries to justify not complying with a Tribunal decision. In order to strengthen the Tribunal's human rights mandate, therefore, and to develop an unquestionable SADC body of human rights law, it is imperative for member states to adopt a SADC human rights instrument.

4 *Eden & Another v Pienaar* 2000 (1) SA 158 (WLD).

5 *Gondo*, p 12.