

REGIONAL DISPUTE RESOLUTION: THE SADC TRIBUNAL'S FIRST TEST

The Southern African Development Community Tribunal (SADC Tribunal) was established by Article 9 of the SADC Treaty and has just handed down its first ruling. This Tribunal is empowered, in terms of Article 16 of the SADC Treaty, “...to ensure adherence to and the proper interpretation of the provisions of (the) Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it. The SADC Protocol on the Tribunal and Rules of Procedure Thereof (the Protocol) circumscribes the Tribunal's jurisdiction in detail. The Tribunal was inaugurated on 18 November 2005. It is seated in Windhoek, Namibia.

On 11 October 2007 Mike Campbell (PVT) Limited, a Zimbabwean registered company, and Another, instituted a case with the Tribunal to challenge the acquisition of agricultural land in Zimbabwe by the Government of Zimbabwe on the basis of, amongst others, an argument that the expropriation of the land has infringed their property rights. The matter was also pending in the Supreme Court of Zimbabwe at the time. As a result, an application was brought in terms of Article 28 of the Protocol for an interim measure to interdict the Government of Zimbabwe from evicting Mike Campbell (PVT) Limited *et al* from the land in question in the meantime. This is referred to as *interlocutory* relief in municipal law parlance.

The Tribunal, *per* the Honourable Justice Dr Luis Antonio Mondlane, the President of the Tribunal, granted the relief on 13 December 2007. As the first ruling of the Tribunal this is significant. The Tribunal held that Article 15 of the Protocol gives it the required jurisdiction. Article 15 provides that the Tribunal shall have jurisdiction over disputes between natural or legal persons and States.

The Tribunal went further and ruled that Article 14 of the Protocol (which gives it jurisdiction over all disputes relating to the interpretation and application of the SADC Treaty) is also applicable. It places particular reliance on Article 4 of this Treaty which obliges Member States to act in accordance with human rights, democracy and the rule of law. This opens the door for Member States of SADC to be dragged before the Tribunal on the basis of breaching principles of human rights, democracy and the rule of law.

In response to the *interlocutory* application the Government of Zimbabwe raised the issue of failure to exhaust local remedies. Article 15(2) of the Protocol requires natural or legal persons to first exhaust all available local remedies before they bring an action against a State before the Tribunal, or they may approach the Tribunal if they are unable to proceed under the domestic jurisdiction. The Tribunal rejected the local remedies point on the basis that it is not relevant at the *interlocutory* juncture. It may be relevant in the main hearing.

Significantly, the Tribunal applied the principles applicable in municipal law for interim relief, *viz*, a *prima facie* right, the absence of an alternative remedy and the fact that the balance of convenience favours the applicant. It made no order as to costs.

In the meantime the Supreme Court of Zimbabwe has ruled in favour of the Government of Zimbabwe and apparently the Government has indicated that it intends proceeding with the seizure of the land in question, This flies in the face of an undertaking given on behalf of the Government before the Tribunal and Zimbabwe's international obligations. It raises the issue of the effectiveness and enforcement of Tribunal decisions and the relationship between municipal and international law.

Article 32 of the Protocol addresses enforcement of Tribunal decisions. This is where the Tribunal's potential weakness lies. Article 32(1) provides that the law for the enforcement of foreign judgments in member states shall govern enforcement of Tribunal decisions. Article 32(2) of the Protocol obliges member states to immediately take all measures to ensure enforcement of decisions of the Tribunal. Article 32(4) of the Protocol provides that any failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal and in terms of articles 32(5) the Tribunal is obliged to refer such failure to the Summit of SADC for appropriate action. This arrangement is not adequate and the ambiguity should be addressed. The principle that must be respected is quite clear. International legal arrangements can never be effective if states, party to international agreements, can escape their international obligations by invoking rulings of domestic courts in their favour. It is also a violation of sovereignty if a national forum decides a dispute involving independent states or the international organizations which they have established.

If the Government of Zimbabwe persists with its seizure of land in defiance of the Tribunal's decision it not only breaches its undertaking to the Tribunal, but also reneges on its obligations under the Protocol. It becomes a diplomatic issue too. What will the SADC Council do in order to ensure respect for its legal instruments? The matter is obviously connected to the domestic political and economic problems within Zimbabwe and in this regard the earlier SADC initiatives (limited as they have been) also failed. There seems to be no effective regional mechanism to ensure stability in situations like these. It is theoretically possible that this matter will continue before the Tribunal and we may see further rulings and clarifications of SADC law.

These issues go to the core of the future role and success of the Tribunal as a regional dispute resolution mechanism. The region's history with respect to regional rules-based structures, dispute resolution and respect for the rule of law is not inspiring. For the development of the region, its integration into the global economy, its attractiveness to investors and its own governance it is vital that we get this right.

Let's put the bogeyman of sovereignty to rest. Sovereignty does not mean that states are above the law. If that were true there can be no international legal order. It is an act of sovereignty to enter into an international agreement. The best protection for sovereign interests (especially against more powerful states) is by adopting the necessary legal instruments and to provide for remedies and enforcement mechanisms. If the WTO (and several regional arrangements) can have effective

dispute resolution and adjudication for its 150 plus members, the technical challenges to have it for 14 Southern African States can't be too big.

It is unfortunate that the first test case for the SADC Tribunal involved a highly complicated and messy political issue. The negative response of the Mugabe government came as no surprise and the human rights dimension is particularly tricky for a Tribunal with jurisdiction over the SADC Treaty and its more than 20 Protocols. SADC is not a human rights organization par excellence.

We should continue to support and strengthen the Tribunal. This first case is not necessarily a disaster; it is a rather poignant reminder of what the rule of law is about. More technical regional issues such as trade, standards, water etc could be more typical of the bulk of SADC's activities and may be easier to tackle. However, we need a clear resolve from member governments to make this judicial body a success and to ensure that its rulings will be respected. Complicated issues regarding jurisdiction, standing and remedies must still be clarified. This Tribunal may (and should) become a major bastion for ensuring respect for the rule of law in our region. However, then the Member States must support and empower it and ensure respect for its rulings.

This raises the following questions:

1. Are these governments committed to a successful and effective Tribunal?
2. Regional legal instruments are signed left, right and centre but they are seldom implemented and enforced. When and how will this change?
3. Could the establishment of the SADC Tribunal mark the beginning of a new era?

Adv. George Coleman
Windhoek Bar

Prof. Gerhard Erasmus
tralac

SADC Tribunal Case No SADCT: 2/07 – Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe (2/07) [2007] SADCT 1 (13 December 2007)