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Title: **“A Viable Supranational Court Born from the Experiences of the Demise of the Southern African Development Community Tribunal”**

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I Introduction

Does the disbandment of the Southern African Development Community¹ Tribunal² established in terms of article 2 of The Protocol on Tribunal & Rules Thereof³ and its impending resurrection, in arguably a largely diminished capacity, spell the end of any possibility of developing a truly supranational organ capable of adjudicating on disputes between Member States, as well as disputes between natural persons and Member States⁴ as was originally envisaged in article 15?⁵

The basis of this research question stems from the disbandment of the Tribunal arguably as a result of Zimbabwe's controversial land redistribution program, along with the recent developments surrounding the Tribunal insofar as the redrafting of the Protocol (the New Protocol) is concerned.

Prior to the disbandment of the Tribunal many scholars were of the view that the adoption of human rights instruments, such as the Tribunal which could hold Member States accountable for respecting human rights, was testament to a growing acceptance by African governments of human rights principles.⁶ Furthermore, that these instruments could in themselves persuade African Governments to uphold human rights principles.⁷

However, the abovementioned *status quo* recently seems to have shifted from that of an optimistic view to a more pessimistic narrative, the cause of this drastic shift can be traced back to the effective disbandment of the Tribunal and the New Protocol currently being discussed amongst Member States.

This paper intends on illustrating what lessons can be learnt from the disbandment of the Tribunal by the Member States, with a view to allowing those lessons to assist in establishing a

¹Southern African Development Community herein after referred to as "SADC"

² Southern African Development Community Tribunal herein after referred to as "the Tribunal"

³ The Protocol on Tribunal & Rules Thereof, 2000 hereinafter referred to as "the Protocol"; the redrafted Protocol on Tribunal & Rules Thereof, yet to be assented too by SADC shall herein after be referred to as "the New Protocol"

⁴ Article 1 of The Treaty of the Southern African Development Community, 1992, herein after referred to as "the SADC Treaty", defines Member State as "*a member of SADC*"

⁵Supra note 4

⁶ Laurie Nathan "*The Disbandment of the SADC Tribunal: A Cautionary Tale*" (2013) Human Rights Quarterly, vol 35 (4) 870

⁷ Ibid

supranational instrument capable of adjudicating conflicts between Member States whilst being cognisant of their respective undertakings to observe human rights principles.

The first part of this paper shall commence with a brief discussion on the elaborate legal edifice upon which SADC has been built on, touching on the various protocols and legal instruments adopted by the Member States with a view to achieving the objectives set out in the SADC Treaty. Therefore the focus of the first part of this paper is an analysis of SADC's constitutive documents whilst briefly examining the legal edifice upon which the European Communities, specifically the European Economic Community, is built on.

The second part of this paper shall be a comparative analysis conducted on the European Economic Community / European Union and SADC with regards to the operation of courts within the European Union versus the operation of the Tribunal. The focus being on the level of application and enforcement of judgements handed down by the instruments in their respective member states.

The third part of this paper shall be an analysis of the Protocol *vis a vis* the New Protocol, whilst highlighting any strengths or weaknesses of the new legal text in contrast to the old. The fourth part of this paper shall deal with the litigation which stemmed from the Zimbabwe's land reform program, with specific focus on the case of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008).⁸ This chapter shall also explore the conflict of laws which presented itself in the case of *Gramara (Pvt) Ltd v. Government of the Republic of Zimbabwe* (HC 33/09) [2010] ZWHHC [Harare High Court].⁹ The focus in the latter case being on the debate between what should be the more persuasive consideration when public policy is at odds with a foreign judgment.

The final part of this paper shall seek to plot a way forward concerning the resurrection of the Tribunal. The „way forward“ taking into consideration the lessons learnt from the various court cases surrounding the Zimbabwe's land redistribution program and drawing on the model of the

⁸ *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008) herein after referred to as the “Campbell Case”

⁹ *Gramara (Pvt) Ltd v. Government of the Republic of Zimbabwe* (HC 33/09) [2010] ZWHHC [Harare High Court] hereinafter referred to as the “Gramara Case”

European Communities. However, the emphasis shall be to attempt to tailor a proposed model for SADC and not to super impose that which has been done in other jurisdictions directly into Africa.

II SADC Legal Edifice

Historical Background

The formation of SADC can be traced back to a meeting of leaders of the so called „*frontline states*“ which included Angola, Botswana, Lesotho and Mozambique, held in Arusha, Tanzania, July 1979.¹⁰ Part of the agenda for the meeting was the possible formation of a development co-ordination organisation, mooted at this meeting, to provide an economic dimension to the political struggles in Southern Africa against colonial minority rule.¹¹ The establishment of such an instrument was also seen as a mechanism of providing the frontline states with a better form of defence in withstanding political and economic domination, not to mention destabilisation of the region by the apartheid regime in South Africa¹².

Eleven years after the meeting held in Arusha, followed a summit in Lusaka, Zambia, whereby a declaration was issued by the summit providing for the formal creation of the Southern African Development Coordination Conference (“SADCC”). In hindsight the SADCC would turn out to be the precursor to SADC. Amongst the objectives of the SADCC listed the pursuit of the following objectives¹³:

1. Reduction of economic dependence, particularly, but not only, on the Republic of South Africa.
2. Forging of links to create a genuine and equitable regional integration.
3. Mobilisation of resources to promote the implementation of national, interstate and regional policies.
4. Concerted action to secure international cooperation within the framework of the strategy for the economic liberation.

Within a decade of its incorporation, after initially enjoying praise and acclaim, support for SADCC began to wane due to the modest results produced by the organisation since its inception. Problems facing the SADCC were numerous, such as an over reliance by the SADCC

¹⁰ Clement Ng’ong’ola „*The Reconstitution of the Southern African Development Community: Some International Trade Law Perspectives*“ (2000) 117 *South African Law Journal* 266

¹¹ *ibid*

¹² *ibid*

¹³ *ibid*

on international donors due to the organisations inability to fund its own programs.¹⁴ Funding issues as well as the unsuccessful attempt to reduce economic dependence on the Republic of South Africa proved problematic, the latter being further complicated by the prospect of the fall of Apartheid. However, the fall of Apartheid also presented itself as an opportunity for the inclusion of South Africa and the re-orientation of Southern African Integration.¹⁵

SADC: Legal Order

In the wake of the problems face by the SADCC, in 1993, the SADC Treaty was concluded transforming the pre-existing SADCC into a new institution namely SADC.¹⁶ The reconstitution of the SADCC into SADC was effected through the conclusion of the SADC Treaty as well as the conclusion of various other declarations.

South Africa's accession to SADC following its conversion to a democratic state characterised by majority rule, called for a revision of the objectives of SADC, as these borrowed largely from those of the SADCC. The revision of SADC's objectives was namely to do with the deletion of references regarding the *„reduction of economic dependence particularly, but not only, on the Republic of South Africa“*.¹⁷

Since its formation, SADC has been built on an elaborate legal edifice centred on its founding treaty and buttressed by protocols on politics and security, extradition, mining, and a range of other topics.¹⁸ The SADC Treaty can be described as the first building block of SADC's legal edifice which the elaborate legal mechanisms governing the operation of SADC revolve around.

In respect of SADC's institutional framework, SADC has been established as an international organisation, with distinct legal personality, capacity and powers¹⁹ to enter into contracts and perform various other ancillary tasks associated with juristic persons. As is customary with the establishment of a supranational organization, all Member States were required to make the

¹⁴ Ng'ong'ola op cit note 10 at 268

¹⁵ Ibid

¹⁶ Frans Viljoen, *International Human Rights Law In Africa*, 2 ed Oxford University Press (2012) at 477

¹⁷ ibid

¹⁸ Nathan op cit note 6 at 872

¹⁹ Article 3 supra note 4

necessary amendments to their national laws as such to enable SADC to have the necessary powers for the proper fulfillment of its functions.

Upon its reconstitution SADC adopted various objectives with its primary aim being to “*achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration*”.²⁰

Other ancillary objectives, development orientated by nature, including the following:

1. *“the promotion of self sustaining development on the basis of collective self reliance and interdependence of Member States;*
2. *achieving sustainable utilization of natural resources and effective protection of the environment;*
3. *achieving complementarity between national and regional development and utilization of the resources of the region; and*
4. *strengthen and consolidate the long standing historical, social and cultural affinities and links among the peoples of the region*”.²¹

The SADC Treaty sets out a wide array of activities to be undertaken by the Member States in the pursuit of the objectives set out, however most importantly the Member States are all obliged to commit to various general undertakings to ensure the realisation of SADC’s objectives. These including undertaking to adopt adequate measures to promote the achievement of the objectives of SADC, refraining from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the SADC Treaty.²² Furthermore, Member States undertook to take all necessary steps to accord the SADC Treaty the force of national law as well as to cooperate with and assist the institutions of SADC in the performance of their duties.²³

²⁰ Article 5 (1)(a) supra note 4

²¹ Article 5(1)(d)-(h) supra note 4

²² Article 6(1) supra note 4

²³ Article 6(5) - (6) supra note 4

Article 9²⁴ establishes six institutions to carry out the proper functioning of SADC, namely, the Summit of Heads of State or Government (“the Summit”); the Council of Ministers (“the Council”); Commissions; the Secretariat and the Tribunal.²⁵ The Summit consists of the heads of state of all Member States and is SADC’s highest decision making body²⁶, responsible for making binding decisions on the overall policy direction and control of the functions of SADC.²⁷

The Council consists of one minister from each Member State²⁸ and has various responsibilities including, the functioning and development of SADC; overseeing the implementation of the policies of SADC, and the proper execution of its policies. Critically, the Council is responsible for approving policies, strategies, and the work programs of SADC.²⁹ Article 11(2)(d) of the SADC Treaty provides that the Council shall be responsible for approving policies, strategies and work programs giving an indication on the wide ranging powers bestowed upon the Council by the SADC Treaty. Thus the Council can be seen as the main driver of SADC responsible for the organization meeting its objectives, however with no binding decision making authority.

In attending to its duties the Council is assisted by the Secretariat which is the principal executive institution of SADC responsible for tasks such as strategic planning and management of SADC’s programs as well as the implementation of the decisions of the Summit. Thus the Secretariat, with the assistance of experts and lawyers, attends to drafting protocols and policy documents negotiated by government officials and ministers, discussed and approved by the Summit and signed by the heads of state.³⁰

In order to assist Member State’s to comply with their legal obligations under the SADC Treaty in respect of assigning the SADC Treaty force of law in each member State³¹, bearing in mind the legal expertise required to conduct such a task and the relative under development of many of

²⁴ Supra note 4

²⁵ Article 9(1)(a)-(f) supra note 4

²⁶ Article 10(8) supra note 4

²⁷ Article 10(2) supra note 4

²⁸ Article 11(1) supra note 4

²⁹ Article 11(2)(a),(b) & (d) supra note 4

³⁰ Nathan op cit note 6 at 873

³¹ Article 6(5) Supra note 4

the Member States, the Council resolved to create SADC's Legal Sector, established by way of the Protocol on Legal Affairs.³²

The objective of creating the Legal Sector was to establish an organ which could provide legal assistance to not only Member States but also SADC and its institutions in the interpretation and implementation of the SADC Treaty.³³

As has previously been stated, the constitutive document of SADC is the SADC Treaty which in turn acts as the foundation of SADC's entire legal edifice. In support of the SADC Treaty various other documents have been discussed and approved by the Summit in order to act as legal aids to help SADC achieve its objectives. These various other documents include protocols in respect of the areas of cooperation amongst Member States, setting out the objectives, scope and institutional mechanisms for cooperation and integration amongst Member States.³⁴

Protocols approved by the Summit form an integral part of the SADC Treaty³⁵ and are in respect to a wide array of areas of cooperation such as trade, investment, peace and security.³⁶

In buttressing the SADC Treaty and the various protocols approved by the Summit, SADC's legal order also enjoys the aid of a vast variety of declarations, memorandums of understanding, pacts, policies and strategy papers namely the Regional Indicative Strategic Development Plan³⁷ ("RISDP"). The RISDP which in corroboration with the Strategic Indicative Plan for the Organ ("SIPO") are the principal documents informing SADC's strategies with regards to all areas of cooperation by Member States. This complex myriad of documentation makes up the legal edifice of SADC.

For purposes of this paper, the most significant institution established by Article 9 of the SADC Treaty is the Tribunal. The Tribunal was constituted in order to ensure adherence and proper interpretation of the provisions of the SADC Treaty and all subsidiary instruments related thereto, as well as to adjudicate on any disputes referred to it by Member States.³⁸ The Tribunal became operational in November 2005 with its establishment initially signaling the beginning of

³² Protocol on Legal Affairs, 2000

³³ Article 2(a) supra note 32

³⁴ Article 22(1) supra note 4

³⁵ Article 22(2) supra note 4

³⁶ Article 21(3) supra note 4

³⁷ Regional Indicative Strategic Development Plan, 2005

³⁸ Article 16(1) supra note 4

a new era. An era whereby it was hoped that Southern African states would accept a limitation to their hard fought sovereignty through international judicial supervision. This optimism was triggered as a result of the Tribunal being empowered to make binding decisions in respect of disputes referred to it.³⁹

Arguably the most significant document adopted by SADC has been the Protocol. The significance of the Protocol can be drawn from the significant powers the Tribunal has been empowered with under the SADC Treaty. Powers set out in articles 32 to 35 of the SADC Treaty concerning sanctions, withdrawals from SADC and the referral of disputes. In this regard all disputes arising from the interpretation or application of the SADC Treaty shall be referred to the Tribunal, should such disputes be incapable of amicable resolution.⁴⁰ Therefore, granting the Tribunal exclusive jurisdiction regarding disputes amongst Member States, and placing the Tribunal as the final arbiter in such disputes. An important task considering the vast area's of cooperation covered by SADC open to dispute between the Member States due to each states competing interests.

Furthermore, article 33(1)(a) of the SADC Treaty provides that sanctions may be imposed on any Member State which persistently fails to fulfill its obligations under the SADC Treaty without good reason. Although the Member States have undertaken specific and general obligations under articles 5(2) and 6⁴¹ respectively, the effect of article 32, is to place an extra obligation on the Member States insofar as being precluded from referring disputes, to any other arbiter but for the Tribunal, for purposes of seeking relief.

The SADC Treaty is silent in respect of the form of sanctions which may be imposed by the Summit on Member States failing to meet their obligations in respect of the SADC Treaty except to say that they shall be determined on a case by case basis.⁴² One can opine that the form of sanction envisaged is of an economic nature as is general practice globally.

When reading the abovementioned sections cumulatively it is clear that whereby a Member State fails to meet its obligations insofar as either failing to refer a dispute to the Tribunal, taking

³⁹ Article 16(5) supra note 4

⁴⁰ Article 32 supra note 4

⁴¹ supra note 4

⁴² Article 33(2) supra note 4

unilateral action against an offending Member State or alternatively failing adhere to the Tribunals rulings, Member States shall be in breach of their obligations under the SADC Treaty. Therefore giving the Tribunal persuasive powers insofar as the operation of SADC.

In conclusion the Tribunals persuasive powers can be seen to be that should a Member State breach its obligations under the SADC Treaty and be directed to remedy such breach by the Tribunal, failure to do so grants the Tribunal the power to escalate the infraction to the Summit for appropriate action. Thus representing the Tribunals sway with regards to its ability to determine the functioning of SADC.

II European Communities

Historical Background

The European Communities consisting of the European Coal and Steel Community (“ECSC”), European Economic Community (“EC”) and the European Atomic Energy Community (“Euratom”)⁴³ are the European equivalent to Africa’s Regional Economic Communities (“REC”s). The Communities at their inception were created for purposes of achieving greater economic integration amongst their members and eventually leading to political integration. Similar to how Africa’s REC”s form the nucleus of the African Union the Communities form the nucleus of the European Union⁴⁴ and have from their very foundation had the express aim of European integration.

With the aforementioned in mind, the objective of this chapter shall be an attempt to briefly examine the legal edifice upon which the European Union was built on. The focus being on the functions of the institutions established in order to drive the organisation. The purpose of the aforementioned being to highlight how a Eurocentric approach has been followed in the establishment of SADC.

The history of the Communities begins in the 1950”s when the French foreign minister, Robert Schuman, proposed the merger of the coal and steel industries of France and Germany.⁴⁵ The intention being that pooling of their resources under the authority of a supranational instrument would dissuade the possibility of any further conflicts between the two nations. The pooling of resources was seen as a platform for the integrated economic growth of the two nations.

After nine months of negotiations the Treaty establishing the European Coal and Steel Community⁴⁶ was signed in Paris on 18 April 1951⁴⁷ with effect from 25 July 1952. According

⁴³ Cumulatively herein after referred to as “the Communities”;

⁴⁴ O F Robinson T D Fergus W M Gordon *European Legal History* 3ed Butterworths London (2000) 309

⁴⁵ Ibid at 310

⁴⁶ Treaty establishing the European Coal and Steel Community, 1951 herein after referred to as the “Treaty of Paris”

to Article 97⁴⁸ of the Treaty of Paris, the treaty was to subsist for a period of 50 years and thus ceased to be of force and effect in July 2002. Therefore with the Treaty of Paris's effective termination the ECSC was „integrated“ into the European Community⁴⁹.

In 1956 the foreign ministers of the ECSC member states met in Venice and adopted what was to be known as the Spaak Report. The Spaak Report argued that achieving economic integration by way of a sector-by-sector approach would be difficult when it eventually came to fully integrating the European economies. Meaning that a sectorial approach to integration via coal and steel was inappropriate in realising a fully integrated European economy.

The Spaak Report thus broadly set out a proposed outline for the measures required to be implemented in the establishment of a common market, the first step towards economic integration. This became the basis for future negotiations around treaties⁵⁰ aimed at economic integration. The goal of the meeting in Venice was to achieve political integration however in the immediate future the only way towards the achievement of this lay by way of firstly commencing with economic integration.⁵¹

The result of the adoption of the Spaak Report and the meeting in Venice was the conclusion of the Treaty establishing the European Economic Community and the Treaty establishing the European Atomic Energy Community.⁵²

As of 1958 three communities existed namely the EC, ECSC and Euratom, of the three communities the latter two were subject specific, meaning that their aims and objectives were specific to economic sectors i.e. steel, coal and nuclear. The EC on the other hand was not, its scope was broad enough to cover any economic activity included in that of the other two communities as well as those falling outside of their scope. The result being that the EC became

⁴⁷ P J G Kapetyn & P VerLoren van Themaat *Introduction to the Law of the European Communities* 3 ed Kluwer Law International (1998) at 7

⁴⁸ Ibid

⁴⁹ Klaus-Dieter Borchardt "*The ABC of European Union Law*" available at http://europa.eu.documentation/legislation/pdf/oa8107147_en.pdf at page 12

⁵⁰ Kapetyn & VerLoren op cit note 47 at 16

⁵¹ O F Robinson, T D Fergus, W M Gordon, *European Legal History*, 3rd Edition, Butterworths London (2000) at 310

⁵² Treaty establishing the European Economic Community, 1957; The Treaty establishing the European Atomic Energy Community, 1957 herein after referred to collectively as "the Treaties of Rome"

by far the most important of the three communities for purposes of achieving an economically integrated Europe.⁵³

Like SADC, the ECSC established certain institutions designed to drive the work of the organization. Article 7 of the Treaty of Paris sets out the institutions to be established in order for the instrument to meet its aims and objectives, those institutions being the High Authority, the Common Assembly, the Special Council composed of ministers of the member states and finally the Court of Justice. The EC and Euratom in their incorporation would follow a similar institutional pattern in terms of the structures created to help them meet their objectives. In that regard no doubt it was from this structure that SADC sought to borrow from when creating its own legal edifice.

The EC and Euratom both had a Commission and a Council of Ministers however they „piggybacked“ on the ECSC’s institutions insofar as the Court of Justice as well as the European Parliament (previously known as “the Assembly”) were concerned. Therefore the Court of Justice and the European Parliament, created under the Treaty of Paris, were to serve all three communities.

However, the time soon came for the need to rationalise and harmonise the Communities and in 1965 the member states concluded the Treaty establishing a Single Council and a Single Commission of the European Communities⁵⁴ which came into force in 1967. The effect of the Merger Treaty was to merge the High Authority of the ECSC and the Commissions of the EC and Euratom into one body being the European Commission⁵⁵. Furthermore, the Merger Treaty provided that the Communities were to be served by one council of ministers being the Council of the European Communities⁵⁶, the effect of this being that the Communities now all shared the same institutions. The aforementioned amounting to possibly the first real step towards the path to achieving a politically unified Europe as had been intimated at the 1956 meeting in Venice.

⁵³Robinson Fergus & Gordon op cit note 51 at 310

⁵⁴ Treaty establishing a Single Council and a Single Commission of the European Communities, 1965 herein after referred to as the “*Merger Treaty*”

⁵⁵ Article 9 supra note 54

⁵⁶ Article 1 supra note 54

The creation of the European Union by means of the ¹ Treaty on European Union ⁵⁷, marked a further step along the path to the political unification of Europe.⁵⁸ The Maastricht Treaty established the European Union, although it did not finish the job as the EC was not integrated into the European Union and thus still had its own separate legal personality. Complete unification was done by way of the Treaty of Lisbon⁵⁹ which merged the European Union and the EC into a single organization. Accordingly, the European Union replaced and succeeded the EC⁶⁰ however the Treaties of Rome would remain in force as a source of law.

For purposes of this chapter, I have chosen to examine the legal edifice of the EC because the ECSC and Euratom were subject specific communities whilst the EC enjoyed a far broader mandate insofar as its aims and objectives are concerned.

This broader mandate tasked the EC with creating a common market to promote the harmonious development of economic activities⁶¹ and is similar to the target of SADC which looks to create a common market, eventually leading to a monetary union, with the hope of stimulating economic growth.⁶² When gleaning over both the EC and SADC treaties aims/objectives it is clear that both instruments have recognised the need for a focus on development in achieving their goals thus making this a suitable instrument to contrast SADC against.

EC: Legal Order

The two treaties establishing the EC and Euratom were both signed in Rome on 25 March 1957, as a result of this sequence of events the treaties have come to be known cumulatively as “the Treaties of Rome”. This chapter shall focus solely on one of them, namely the Treaty establishing the European Economic Community.⁶³

Article 1 of the EC Treaty established the EC with its purpose apparent from the first recital in the preamble which records that the parties are determined to lay the foundations of a closer

⁵⁷ Treaty on European Union, 1993, herein after referred to as the “Maastricht Treaty”

⁵⁸ Borchardt op cit note 49 at 12

⁵⁹ Treaty of Lisbon, 2007

⁶⁰ Borchardt op cit note 49 at 13

⁶¹ Article 2 supra note 52

⁶² Article 5(1)(a) supra note 4

⁶³ Treaty establishing the European Economic Community, 1957 as amended by the Maastricht Treaty herein after referred to as the “EC Treaty”

union among the peoples of Europe.⁶⁴ The aforementioned is an indication that the concept of a united Europe i.e. fully integrated, has always been one of the underlying objectives in the formation of the EC, naturally the EC would later serve as one of the cornerstones of the European Union. Interestingly a similar objective can be gleaned from article 5(1)(d) of the SADC Treaty, which provides that the objective of SADC is to “*consolidate*” the historical ties of the peoples of the region.

The objective of the EC is set out in Article 2⁶⁵, which tasks the EC with establishing a common market as well as an economic and monetary union; the promotion throughout the EC of a harmonious development of economic activities, as well as closer relations between the member states belonging to the EC. In line with underlying objective set out in the preamble being that of European integration.

Interestingly the abovementioned linear approach to market integration, developed decades ago, is the basis upon which SADC decades later has chosen to attempt to achieve market integration. The striking feature of this being how the prevailing economic conditions in 1950’s Europe and 21st century Africa are far from similar with one another.

Article 3 of the EC Treaty sets out the activities to be undertaken by the EC in order to meet its objectives, the most important of which including the following:

1. *“the elimination, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;*
2. *a common commercial policy;*
3. *an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;*

...”

These activities falling squarely within the ambit of Viner’s (1950) classical model of market integration. Therefore by implication SADC has chosen to replicate an integration model developed fifty years ago when the world was a far different place.

⁶⁴ A H Robertson *European Institutions: Co-Operation :Integration: Unification* 3 ed Stevens & Sons Limited (London), Matthew Bender (New York) 1973 at 174

⁶⁵ Supra note 63

Article 4⁶⁶ establishes 5 institutions tasked with implementation of the activities set out in Article 3⁶⁷, those institutions being the Assembly (European Parliament); the Council; the Commission, the Court of Justice (discussed in chapter 3) and the Court of Auditors. However, due to the integration of the EC and the European Union, its original structure amalgamated with that of the European Union and was increased to seven institutions by article 13⁶⁸ namely:

- 1) The European Parliament.
- 2) The European Council.
- 3) The Council.
- 4) The European (“the Commission”).
- 5) The Court of Justice.
- 6) The European Central Bank.
- 7) The Court of Auditors.

As set out from above, SADC’s institutional structure is very much aligned to that of its European cousin.

The European Council and the Council

The European Council defines the general political direction and priorities of the European Union⁶⁹, in the same vain as the role played by the Summit in SADC. The European Council, whilst not exercising legislative functions, is a vital element of the European Union. The European Council consists of the Heads of State of member states of the European Union.⁷⁰

The Council on the other hand was established in terms of Article 1 of the Merger Treaty and replaced the Special Council of Ministers of the European Coal and Steel Community, the Council of the European Economic Community and the Council of the European Atomic Energy established in terms of the Treaty of Paris and the Treaties of Rome respectively.

The Council jointly with the European Parliament is the legislative arm of the EU. The aforementioned institutions also jointly exercise budgetary functions. The Council has the task of

⁶⁶ Supra note 63

⁶⁷ Ibid

⁶⁸ Supra note 57

⁶⁹ Article 15(1) Supra note 57

⁷⁰ Article 15(2) Supra note 57

taking the final decision on, and carrying out, the proposals submitted to it by the Commission as well as acting on decisions taken by the European Council⁷¹. The Council shall consist of representatives of each member state at ministerial level.⁷² As can be seen from the tasks assigned to it, the SADC Ministerial Council and the Council do not just share the same name but also almost identical functions in their duties as well as their compositions.

The European Parliament

The European Parliament was originally called “the Assembly” but was renamed to the European Parliament” by the Single European Act.⁷³ The members of the European Parliament are representatives of the people and the body represents the peoples of the European Union collectively and independently⁷⁴. Members are elected via direct universal suffrage⁷⁵ and as representatives of the people of Europe, members are not bound by the instructions of their governments, or of the national parliaments.⁷⁶ The European Parliament exercises a legislative and supervisory role insofar as passing EU laws, together with the Council whilst also providing democratic scrutiny to all EU institutions⁷⁷.

The Commission

Generally speaking it may be said that the Commission is an organ which is executive in character⁷⁸ as it carries out the European Union’s decisions and policies. The Commission also proposes legislation and is often instrumental in shaping the decision making of the Council. The main responsibilities of the Commission consist of promoting the general interest of the European Union, ensuring the application of the European treaties i.e. the EC Treaty and to oversee their application under the control of the Court of Justice, as well as to exercise executive management functions.⁷⁹

⁷¹ M Horspool & M Humphreys *European Union Law* 6 ed, core text series Oxford University Press (2010) at 43

⁷² Article 16(2) Supra note 57

⁷³ Title 2 of the Single European Act – “Provisions amending the Treaties” establishing the European Communities

⁷⁴ Kapetyn & VerLoren op cit note 47 at 209

⁷⁵ Article 14(3) supra note 57

⁷⁶ Ibid

⁷⁷ EU institutions and Bodies available at <http://europa.eu/about-eu/institutions-bodies/>

⁷⁸ A H Robertson, *European Institutions: Co-Operation: Integration: Unification*, 3rd Edition, Stevens & Sons Limited (London), Matthew Bender (New York) 1973 at 183

⁷⁹ Horspool and Humphreys op cit note 71 at 56

The commission is intended to give expression to the European Union's interests with its most important activity being formulating proposals for new policies concerning the EU, mediating between member states to secure the adoption of these proposals, coordinating national policies and overseeing the execution of existing policies.⁸⁰ Members of the Commission shall in the general interest of the Communities be independent in the performance of their duties, thus taking no instructions or mandates from the national governments.⁸¹ The aforementioned does not prevent governments or interest groups from lobbying commissioners.

In conclusion, it is clear that the key drivers of the EC/EU are the institutions, charged with the overseeing of the objectives as well as the manner of attending to meeting those objectives. As demonstrated, this is largely the same model adopted by SADC in establishing itself as regional body. The institutions of SADC resemble those of the European Union in their structure as well as in their functioning, variances existing mainly as a result of SADC having yet to reach monetary union stage in its progression towards market integration as well as due to the fact that SADC is a regional body as opposed to a continental one.

III The Court of Justice *vis a vis* the Tribunal: Comparative Analysis

As mentioned in chapter 1, the focus of this chapter shall be a comparative analysis of the European Union and SADC insofar as the operation of the Court of Justice and the Tribunal are concerned. The focus in this regard being on the application and enforcement of judgements by the respective instruments in their respective member states. Highlighting how the Tribunal super imposed the characteristics of its EU counterparts except insofar as the enforcement mechanism of judgments was concerned, perhaps pointing to a distrust of the Tribunal by the Member States.

The Judicial system of the European Union was, until the enactment of the Treaty of Nice⁸² which amended various provisions of the Maastricht Treaty as well as the Treaties Establishing the Communities, a two tier judicial system.⁸³ This comprised of the Court of Justice, initially

⁸⁰ T C Hartley, *The Foundations of European Community Law*, 5 ed, Oxford University Press (2003), at 11

⁸¹ Article 17(3) *supra* note 57

⁸² Treaty of Nice, 2001

⁸³ Horspool and Humphreys *op cit* note 71 at 66

established by the Treaty of Paris, as well as the General Court initially established to relieve the growing case load of the Court of Justice⁸⁴. The aforementioned two tier system is also assisted by „specialised courts“ established in terms of the Treaty of Nice which can be regarded as the third and final tier of the European Union“s legal edifice.⁸⁵

The fundamental task of the abovementioned institutions is in terms of article 19(1) of the Maastricht Treaty to ensure that in the interpretation and application of the Treaties⁸⁶, the law of the European Union, is observed.⁸⁷ The Court of justice is the main court of the European Union⁸⁸ as was envisioned over fifty years ago by the Treaty of Paris and the Treaties of Rome. The court shall consist of one judge from each member state⁸⁹, and is assisted by officials termed “Advocate Generals”. There are eight Advocate Generals⁹⁰ tasked with delivering reasoned opinions on cases brought before the court⁹¹, an important task particularly as their impartial submissions on law and fact form an extremely valuable basis upon which the court can arrive at its judgements.⁹²

Insofar as the composition and structure of the Court of Justice is concerned the judges and Advocate Generals are appointed for six years⁹³, in terms of article 19(2) of the Maastricht Treaty read with articles 252 and 253 of the TFEU. Individuals chosen to serve as judges and Advocate Generals must be persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their own countries of origin or alternatively are legal experts of recognised competence⁹⁴.

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ Referring to the following 3 treaties, The Treaty on European Union, 1993 (The Maastricht Treaty); Treaty Establishing the European Economic Community, 1957 (amended and renamed by the Maastricht Treaty to the Treaty on the Functioning of the European Union herein after referred to as the “*TFEU*”); and the Treaty establishing the European Atomic Energy Community, 1957; which shape the law surrounding the European Union

⁸⁷ Horspool and Humphreys op cit note 71 at 67

⁸⁸ Ibid at 74

⁸⁹ Article 19(2) supra note 57

⁹⁰ Article 252 supra note 86

⁹¹ Horspool and Humphreys op cit note at 74

⁹² Kapteyn & Verloren van Themaat, *The Law of the European Union and the European Communities*, 4 ed Kluwer Law International BV, (2008) at 233

⁹³ Article 19(2) supra note 57

⁹⁴ Kapteyn & van Themaat op cit note 92 at 234

Insofar as the appointment of judges is concerned, appointment is done by way of common accord of the governments of the member states⁹⁵ after consultation with a panel⁹⁶ composed of former members of the Court of Justice, General Court members of national supreme courts and lawyers of recognised competence. The panel is established to give opinions on candidates suitability to perform the duties required⁹⁷.

Duties and Powers of the Court of Justice

The powers of the Court of Justice can be divided into three categories⁹⁸ namely settling disputes by handing down rulings⁹⁹, giving preliminary rulings¹⁰⁰ and ruling in other cases provided for under the Treaties.¹⁰¹ The last category representing a sort of catch all function. The jurisdiction of the Court of Justice, insofar as the matters the court may hear, extends to all law of the European Union in accordance with article 19 of the Maastricht Treaty.

The Court of Justice has two forms of jurisdiction, namely, plenary jurisdiction and preliminary rulings.¹⁰² The court has plenary jurisdiction in respect of the following:

1. Infringement actions concerning actions brought by the Commission against member states.¹⁰³
2. Actions brought by member states against fellow member states.¹⁰⁴
3. Actions brought by the Commission against member states for non-compliance with court rulings.¹⁰⁵
4. Actions in respect of compensation for damages.¹⁰⁶
5. Actions to hold the European Union contractually liable.¹⁰⁷

⁹⁵ Articles 19(2) of the Maastricht Treaty read alongside with article 253, 254 and 255 of the TFEU

⁹⁶ Ibid

⁹⁷ Article 255 supra note 86

⁹⁸ Kapteyn & van Themaat op cit note 92 at 238

⁹⁹ Article 19(3)(a) supra note 57

¹⁰⁰ Article 19(3)(b) supra note 57

¹⁰¹ Article 19(3)(b) supra note 57

¹⁰² Horspool and Humphreys op cit note 71 at 67

¹⁰³ Article 258 supra note 86

¹⁰⁴ Article 259 supra note 86

¹⁰⁵ Article 260 supra note 86

¹⁰⁶ Article 268 supra note 86

¹⁰⁷ Article 340 supra note 86

The aforementioned actions are not the only actions which can be heard by the court as it should be remembered that the Court of Justice acts as a court of first instances in certain matters within its jurisdictional competence whilst other matters fall within the courts jurisdiction only when brought on appeal from the General Court¹⁰⁸.

Insofar as the types of persons that can bring actions before the Court of Justice as well as the General Court, no right of individual access exists with article 40¹⁰⁹ providing for minor exceptions. In terms of article 40 of the TFEU, member states, bodies, offices and agencies of the European Union and any other person who can establish an interest in the result may intervene in matters pending before the Court of Justice, furthermore whereby an independent party (natural/legal persons) is able to establish that it has a substantial interest in the result of the matter pending before the Court of Justice, the aforementioned party shall be entitled to intervene in the matter subject to the proviso that private individuals may not intervene in matters pertaining to disputes between member states, member states and the community's institutions as well as between the community's institutions themselves.

Insofar as preliminary rulings are concerned, article 267 of the TFEU provides that the court can give preliminary rulings on the following:

1. Interpretation of the Treaties.
2. Validity of acts and interpretations of the institutions.
3. Preliminary rulings on points of EU law.¹¹⁰

The court also has the power to award interim measures in direct actions, including infringement proceedings, in terms of articles 278 and 279 of the TFEU.¹¹¹ The court is also vested with the following miscellaneous powers:

1. Imposing penalties in respect of regulations adopted jointly by the European Parliament and the Council.
2. Disputes involving the European investment bank, on arbitration clauses contained in contracts concluded by the community, disputes submitted under special agreements as

¹⁰⁸Horspool and Humphreys op cit note 71 at 79

¹⁰⁹ Supra note 86

¹¹⁰Horspool and Humphreys op cit note 71 at 77

¹¹¹Horspool and Humphreys op cit note 71 at 78

well as when asked to render an opinion in respect of international agreements with third countries or international organisations.¹¹²

Duties and Powers of the General Court

The General Court similar to the Court of Justice contains one judge per member state, and according to article 48 of the Statute of the Court of Justice¹¹³ shall have twenty seven judges. No doubt this is still to be amended to reflect the European Union's increased membership which currently stands at twenty eight members. The General Court was originally created in 1989 to alleviate the workload of the Court of Justice. The method of appointment of judges to the General Court is virtually identical to that of the judges and advocate general of the court of justice.

The General Courts task is to hear and determine the following matters at a first instance, namely:

1. In terms of article 256 of the TFEU, direct actions concerning the legality of acts by the institutions of the European Union.
2. The failure of an institution to act can be brought before the General Court.¹¹⁴
3. Actions and failures to act with respect to compensation for damages.¹¹⁵
4. Actions in respect of disputes between the European Union and staff members.¹¹⁶
5. Arbitration clauses except for those assigned to specialised courts.¹¹⁷

The General Court also has jurisdiction with regards to direct actions for annulments and for failure to act brought by the member states against:

1. *“decisions of the Council concerning state aid;*

¹¹²Horspool and Humphreys op cit note 71 at 79

¹¹³ Statute of the Court of Justice, 2010 herein after referred to as “the Statute”

¹¹⁴ Article 265 supra note 86

¹¹⁵ Article 268 supra note 86

¹¹⁶ Article 270 supra note 86

¹¹⁷Horspool and Humphreys op cit note 71 at 79

2. *Acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade;*
3. *Acts of the Council by which it directly exercises implementing powers;*
4. *Acts of the European Central Bank and acts of the Commission with the exception of those which concern enhanced cooperation*¹¹⁸

The Tribunal

The Tribunal is one of six organs established under article 9 of the SADC Treaty. The Protocol granted the Tribunal exclusive jurisdiction over the interpretation and application of the SADC Treaty, the interpretation, application, or validity of SADC law and acts of SADC organs, as well as any other mandate specific matter.¹¹⁹

The Tribunal was constituted in terms of Article 16 of the SADC Treaty and was to function in accordance with the provisions of the SADC Treaty and the Protocol.¹²⁰ Much like the Court of Justice and the General Court, the Tribunal was to consist of not less than 10 judges, appointed from nationals of Member States who possessed the requisite qualifications required for appointment to the highest judicial offices in their respective Member States or who were jurists of recognised competence.¹²¹ In the same vein as the Court of Justice, each Member State was entitled to nominate one candidate having the necessary qualifications.

Furthermore, of the ten judges appointed to the Tribunal, the Council was required to designate five of the judges to sit regularly on the Tribunal.¹²² The additional judges constituting a pool from which the President would be entitled to invite a judge to sit on the Tribunal whenever a regular judge was temporarily absent or was otherwise unable to carry out their functions.¹²³ No two or more judges were allowed to be nationals of the same Member State.¹²⁴

Judges were to be selected by the Council from a list of candidates so nominated by Member States¹²⁵, with the judges being appointed by the Summit on the recommendation of the

¹¹⁸ Horspool and Humphreys op cit note 71 at 80

¹¹⁹ Viljoen op cit note 16 at 492

¹²⁰ Article 2 supra note 3

¹²¹ Article 3 supra note 3

¹²² Article 3(2) supra note 3

¹²³ Article 3(2) supra note 3

¹²⁴ Article 3(6) supra note 3

¹²⁵ Article 4(3) supra note 3

Council¹²⁶, for a term of five years. The selection of judges a unique feature to the Tribunal as it allowed Member States a greater level of control in appointing judges as opposed to that found in the Court of Justice and General Court which appoints judges on the recommendation of a panel established in terms of article 255 of the TFEU.

Article 15 of the Protocol set out the scope of jurisdiction of the Tribunal, which included disputes between Member States, as well as between natural or legal persons and Member States.¹²⁷ It is important to note that no natural or legal person was entitled to bring an action against a Member State unless they had exhausted all available remedies or were unable to proceed under their domestic jurisdiction¹²⁸. This demonstrates a divergence between the Tribunal and its European cousins, as where the Tribunal granted *locus standi* to private individuals the same was not the case in Europe.

The Tribunal also had jurisdiction to act as an appellate court in cases whereby a party to a matter wished to appeal any dispute relating to the legal findings and conclusions of a panel established under a protocol.¹²⁹ Appeals being limited to issues of law and legal interpretation. This is similar to the powers and duties bestowed upon the Court of Justice which is a court of first instance on certain matters but is endowed with appellate jurisdiction insofar as matters from the General Court are concerned.

Similar to its EU counter parts, the Tribunal was empowered with the ability of providing preliminary rulings¹³⁰ as well as advisory opinions¹³¹, on the application and/or interpretation of the SADC Treaty, the protocols and all other instruments adopted by SADC's institutions or bodies.¹³² However, in terms of article 21(b) of the SADC Treaty, the Tribunal was also expressly entitled to develop its own jurisprudence having regard to the principles of public international law.

¹²⁶ Article 4(4) supra note 3

¹²⁷ Article 15(1) supra note 3

¹²⁸ Article 15(2) supra note 3

¹²⁹ Article 20(a) supra note 3

¹³⁰ Article 16 supra note 3

¹³¹ Article 20 supra note 3

¹³² Article 21(a) supra note 3

Another similar characteristic found between the Tribunal and the Court of Justice as well as the General Court is the power to make award the interim rulings i.e. interim measures.¹³³ The relatively wide nature of the term “interim measures” envisioned under the Court of Justice are also adopted by the Tribunal insofar as it is empowered to order the suspension of acts challenged before the Tribunal as well as to take “*other interim measures as necessary*”¹³⁴ similar to the Court of Justice.¹³⁵

Enforcement of Judgements

For purposes of the European Union, if a member state fails to comply with a judgement, infringement proceedings may be brought against the member state by the Commission before the Court of Justice¹³⁶ in terms of article 260.¹³⁷ By the end of 1994 the Court of Justice had found against member states on 23 separate occasions, thus the burden of ensuring that judgements of the Court of Justice are complied with seems to fall mainly on the Commission, which in most cases succeeds in persuading member states to comply with court proceedings.¹³⁸

Article 260(2) TFEU, formerly article 228(2) of the EC Treaty, provides for the possibility of the Court of Justice imposing a financial penalty on the offending member state if it fails to comply with a judgement.¹³⁹ This step can be as the ultimate stage in persuading member states to comply and therefore relatively rare.¹⁴⁰ The Treaty of Lisbon has sped up the system of pecuniary sanctions and also enables the Court of Justice to impose pecuniary sanctions, once the initial judgement establishing a failure to fulfil obligations has been given, in the event of a failure to notify national measures implementing a directive to the commission.¹⁴¹

Article 32 of the Protocol regulates the enforcement and execution of judgements by the Member States. The law and rules of civil procedure for the registration and enforcement of foreign judgements in force in the territory of the Member State in which the judgement were to be

¹³³ Article 28 supra note 3

¹³⁴ Ibid

¹³⁵ Article 279 supra note 86

¹³⁶ Horspool and Humphreys op cit note 71 at 78

¹³⁷ Supra note 86

¹³⁸ Horspool and Humphreys op cit note 71 at 78

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Ibid

enforced governed enforcement.¹⁴² Member States were required to take all steps necessary to ensure the enforcement of decisions of the Tribunal, with decisions being binding on all Member States party to the dispute and enforceable within the territories of those Member States. Any failure by a Member State to comply with a decision of the Tribunal was to be referred to the Tribunal, which if the Tribunal established the existence of such failure, would report its finding to the Summit for the latter to take appropriate action.¹⁴³

With the abovementioned in mind, the mechanisms available to Member States in the enforcement of judgments under SADC showcased a completely different approach to that found in the European Union. Whereas whilst in the European Union the remedies available to member states whereby a party failed to adhere to a judgment are clear and precise, including recourse to financial penalties. The same was not true for SADC which provided for no financial penalty nor any concrete form of sanction as the ultimate decision lay at the hands of the highly politicised Summit, a weakness of the Tribunals enforcement mechanism.

When looking at the powers, duties, functions and structure of the Tribunal *vis a vis* the Court of Justice as well as the General Court, it is clear that there are a large number of common features. Synergies shared between the institutions insofar as the Tribunal was concerned, the drafters of the Protocol borrowed heavily from the European Union model. This is exhibited even in the manner in which judges were appointed, however an interesting divergence between the institutions was evident in the enforcement of judgments mechanism. What is of interest is that insofar as the enforcement of judgments is concerned arguably where the much maligned Eurocentric approach should have been adopted hook , line and sinker as seen with other provisions of the Protocol this was not done. Instead a rather weak enforcement mechanism was adopted, this perhaps showing an early distrust or unwillingness to be bound to the Tribunals rulings by Member States.

In conclusion, it is striking that in adopting such a weak enforcement mechanism, SADC conveniently paid little attention to the fact that as a result of the repressive nature of certain African regimes, the continent has become notorious for not always abiding by court judgments making such an enforcement mechanism all the more peculiar.

¹⁴² Article 32(1) supra note 3

¹⁴³ Article 32(5) supra note 3

IV Comparative Analysis of the Protocol v the New Protocol

The focus of this chapter shall be to highlight the strengths and weaknesses of the New Protocol versus that of the Protocol, by way of conducting a comparative analysis between both legal texts. The purpose of this is to ascertain whether or not any lessons were learnt by SADC following the disbandment of the Tribunal. Specifically, whether or not those lessons have been applied in a manner meant to benefit the people of sub Saharan Africa or whether to merely benefit the narrow interests of the Summit.

The Tribunal, established in terms of Article 16(1) and (2) of the SADC treaty, became operational in November 2005. Its establishment initially seemingly signaling the beginning of a new era in which Southern African States were seemingly willing to accept a limitation to their hard fought right to self-determination through international judicial supervision.¹⁴⁴

However, the euphoria surrounding the Tribunals establishment was short lived. The work of the Tribunal was suspended in August 2010, when the Summit ordered a review on the role, function and terms of reference of the Tribunal¹⁴⁵ merely 5 years after its becoming fully operational. The suspension of the Tribunal and its subsequent disbanding emanating from the political fall out brought about by the *Campbell Case*.

Following the fall out from the decision to suspend the Tribunal, the Council, acting upon its mandate from the Summit to amend the Protocol, began the process of amending the Protocol.¹⁴⁶ On 18 August 2012 the Summit, suspended the work of the Tribunal indefinitely and resolved that a New Protocol on the Tribunal should be negotiated and that its mandate should be confined solely to inter-State disputes.¹⁴⁷

In August 2014, at a meeting of the Summit, the Member States paved the way for the revival of the Tribunal by the adoption of the New Protocol in respect of the Tribunal. Currently nine heads of state have signed the New Protocol however none have ratified same in their own countries. The haste with which the heads of state have attended to sign the New Protocol is rather

¹⁴⁴ Erika de Wet “*The Rise and the Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa*” (2013) Oxford University Press on behalf of ICSID (28) 1 at 47

¹⁴⁵ Ibid

¹⁴⁶ Ibid

¹⁴⁷ Ibid

worrisome, as the New Protocol in its current format leaves the organ as nothing more than another paper tiger with good intentions.

The discussion to follow shall not be a line by line comparative analysis over both the new and old protocols as many changes which can be found in the New Protocol as compared to the Protocol are largely cosmetic changes. For instance, the word “Member”¹⁴⁸ which was used to denote “...members of the Tribunal...”¹⁴⁹ has been changed to “Judge”¹⁵⁰, which from a drafting point of view is a good start as the previous position led to confusion at certain portions of the text insofar as whether the term was with reference to judges of the Tribunal or Member States.

The focus of the discussion will thus purely revolve around those portions I believe to be the salient amendments and the effects they may have going forward. The first salient difference between the Protocol and the New Protocol can be found with regards to the selection and appointment of judges regulated under article 4 of the New Protocol¹⁵¹. Previously judges were to be appointed to the Tribunal by the Summit upon having received recommendations from the Council.¹⁵² However, under the New Protocol, Judges are to be appointed by the Summit upon recommendation of the Council in accordance with guidelines adopted by the Summit from time to time.¹⁵³ The appointment of Judges, previously made no mention of “*guidelines adopted by the Summit from time to time*”.

The additional wording seems to be an attempt by the drafters to water down the powers previously granted to the Council by the Protocol, reason being, in terms of South African constitutional law the term “*upon recommendation of*” binds the authority to whom which recommendations have been made, to have to uphold those recommendations.

Thus the additional wording, instead of binding the Summit to appoint a candidate recommended by the Council, the Summit are now empowered with the authority to set guidelines as to the type of candidate they are looking to appoint. Granting the Summit a measure of extra control over the Council in respect of the types of judges the Summit want to sit on the Tribunal and thus

¹⁴⁸ Article 1 supra note 3

¹⁴⁹ Ibid

¹⁵⁰ Article 1 supra note 3

¹⁵¹ Previously regulated in terms of Article 4 supra note 3

¹⁵² Article 4(4) supra note 3

¹⁵³ Article 4(4) supra note 3

the type of judges the Council should propose, which was not previously envisioned under the Protocol. No doubt this extra control in the form of guidelines is a response to the *Campbell* case insofar as the Tribunal was often criticised for its apparent overreach into Zimbabwe's policy space and domestic affairs.¹⁵⁴ One cannot help but feel that the additional wording has left space for the politicisation of the appointment of judges, insofar as allowing the Summit to rubber stamp only those judges with a track record of being somewhat pro government.

As is customary in the legal profession, prior to taking judicial office, judges are required to take an oath to affirm their willingness to carry out their duties diligently and to the best of their abilities. The aforementioned declaration¹⁵⁵ speaks to the next point of divergence between the Protocol and the New Protocol. Under Article 5¹⁵⁶ all judges were required to make a solemn declaration that they would carry out their duties independently, impartially and conscientiously. In terms of the New Protocol¹⁵⁷ all judges are still required to make a solemn declaration, what is noteworthy is the inclusion of the following wording "*reserve the confidentiality of the Tribunals deliberations*".

The abovementioned wording was not in the previous article dealing with the solemn declaration, as this principal is trite in law in most jurisdictions. Perhaps the additional wording is a response by the drafters to the fierce criticism leveled at the Council as well as the Summit by the previous judges of the Tribunal upon its disbandment. The Judges going as far as to charge that the disbandment was ultra vires and done in bad faith¹⁵⁸ criticism leveled at the Summit being no more scathing than that of Justice Pillay who described the Member States decision to constitute the Tribunal as nothing more than a mere gambit to illicit funds from the European Union and other international donors.¹⁵⁹

It should be noted that Article 13 of the New Protocol states that Judges shall be immune from prosecution for anything said or done by them in their judicial capacity. This exemption from prosecution although well intentioned, is rather wide and may need to be harmonized with article

¹⁵⁴ Nathan op cit note 6 at at 876

¹⁵⁵ Previously regulated under Article 5 supra note 3

¹⁵⁶ Supra note 3

¹⁵⁷ Article 6 Supra note 3

¹⁵⁸ Nathan op cit note 6 at 878

¹⁵⁹ Nathan op cit note 6 at 883

6.¹⁶⁰ The intentional inclusion of the confidentiality requirement in the solemn declaration could, on an interpretation of the Protocol, render the confidentiality requirement meaningless as article 13 acts as a catch all.

Article 12 of the New Protocol deals with the disqualification or recusal of judges of the Tribunal, previously regulated under article 9 of the Protocol. Article 12(4) of the New Protocol fully develops the notion of a “*conflict of interests*” which had not been done previously. Article 12(4) states:

“Conflict of interest include without limitation, the possession by a judge, or a close family member of a judge or associate of a judge, of any financial and property interests relevant to the dispute, and the affiliations or employment of a close family member of a judge or associate of a judge on interests relevant to the dispute”.

Although this is a fairly trivial article and one which is far from controversial, it should be noted that it is unlikely any of the scenario’s covered in the carve out of “*conflict of interests*” will ever play themselves out as the possibility has been removed with the scaling down of the scope of jurisdiction of the Tribunal *vis a vis* to only state versus state disputes and thus may not be appropriate for the text.

Jurisdiction in terms of the New Protocol is now dealt with under Articles 33 as opposed to Article 14 and 15 of the Protocol. Article 33 states “*the Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and the Protocols relating to disputes between Member States*”. Whereas Article 14 and 15 state, respectively –

“The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to:

- a) *the interpretation and application of the Treaty;*
- b) *the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community;*

¹⁶⁰ Supra note 3

- c) *all matters specifically provided for in any other agreements that Member States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.*

Article 15:

1. *The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and states;*
2. *No natural or legal person shall bring an action against a state unless he or she has exhausted all available remedies or is unable to proceed under domestic jurisdiction*
3. *Where a dispute is referred to the Tribunal by any party the consent of the other parties to the dispute shall not be required.*

The following can be noted from the abovementioned, the scope of jurisdiction has been diminished rather drastically, whereas previously the Tribunal had jurisdiction in disputes between Member States and the community, interstate disputes as well as disputes between natural or legal persons and Member States. However the New Protocol in its current form now only provides for the Tribunal to have the jurisdiction to hear matters pertaining to disputes involving Member States only, thus removing the *locus standi* of natural persons to be heard before the Tribunal.

The removal of the Tribunals *locus standi* to hear natural persons is regrettable as individual complaints for SADC law violations by member states have to date been the defining feature of the Tribunal.¹⁶¹ In the last few years individual complaints have set outstanding precedents for the emergence of African regional jurisprudence.¹⁶² Although with this in mind, the potential loss of *locus standi* could be offset by the African Court on Human and Peoples Rights. The aforementioned promises to become a unique continent wide jurisdiction for intrinsic human rights cases, independent from the overlapping sub regional integration schemes.¹⁶³

¹⁶¹ Lukas Knott, "How to Reboot the SADC Tribunal: A European Perspective" SADC Law Journal (2) 2 (2012) at 310

¹⁶² Ibid

¹⁶³ Ibid

From a strictly academic point of view, the concern about the abolishment of individual access is that since the Tribunal's contribution to regional integration and to the respect of community law has so far been its jurisprudence on individual complaints. The question is how to obtain judicial stimulation and control of SADC through deliberating over other disputes such as interstate disputes, bearing in mind however that up until this day none have been brought to the Tribunal for deliberation.¹⁶⁴

Academic scholar Lukas Knott argues that the Court of Justice can serve as an example to SADC as it exemplifies a court that although having never provided for individual complaints against member state, has still been effective. The Court of Justice, he argues, has had an immense impact on a large array of individual rights and the respective domestic court procedures through the mechanism of preliminary rulings.¹⁶⁵ He further argues that:

“in the long term - assuming the success of the regional judiciary is a lasting one – it could even prove beneficial to exclude individual actions against community members from Tribunals jurisdiction. A single community court is hardly best placed for being direct addressee of all legal resources by community citizens implicating SADC and international law to some degree. It would be much more desirable to achieve a subsidiary application of community law by domestic, low-instance courts, with the SADC Tribunal only setting interpretive precedents for that purpose”¹⁶⁶.

Thus in light of the aforementioned, it is inferred that the removal of individual access is cushioned by the right to seek preliminary rulings.¹⁶⁷ Unfortunately however the New Protocol has also removed the right to seek preliminary rulings¹⁶⁸, this coupled with the removal of individual access renders the argument somewhat moot.

Furthermore, although the idea of having subsidiary application of community law by domestic low instance courts is a good idea, it does not seem to take account of the fact that SADC already operates under a severely constrained budget even though eighty percent of its funding is

¹⁶⁴ Knott op cit note 161 at 311

¹⁶⁵ Ibid

¹⁶⁶ Ibid

¹⁶⁷ Article 17 supra note 3

¹⁶⁸ Article 16 supra note 3

currently being sourced from foreign donors¹⁶⁹. Thus to add lower instance courts may lead to a better functioning Tribunal and better jurisprudence, however weighed up against the financial implications may not be viable.

From the argument advanced by Lukas Knott, it can also be said that perhaps the right of individual access to the Tribunal was inappropriate in the African context. As even in the European Union, individuals are precluded from intervening in matters pertaining to disputes between member states, member states and the community's institutions as well as between the community's institutions themselves.¹⁷⁰

In such instances if a private individual is of the opinion that his rights under EU law have not been respected by the national authorities of a member state, at EU level private individuals are only entitled to submit petitions to the European Parliament¹⁷¹ via the Committee on Petitions of the European Parliament. In order to have the European Parliament debate how EU law has been applied in that particular member state, how its application has been to the detriment of the party filing the petition and presumably whether the application of the law was correct or not.¹⁷²

Alternatively private individuals are entitled to contact the European Commission concerning the application of EU law to which the individual believes has been applied inconsistently or to their detriment.¹⁷³ Lastly, persons are entitled to contact the European Ombudsman should they feel the Commission did not satisfactorily deal with their complaint.¹⁷⁴

The abovementioned demonstrating that individual access is the exception as opposed to the rule insofar as quasi-judicial bodies of this nature are concerned. With that in mind it would seem that indeed, the right to individual access was largely inappropriate and that although its abolishment is unfortunate, what is most unfortunate in the circumstances is that the right to seek preliminary rulings has been abolished.

¹⁶⁹ Nathan op cit note 6 at 882

¹⁷⁰ Article 40 supra note 86

¹⁷¹ Article 227 supra note 86

¹⁷² Enquiries and Complaints about Application of Union Law available at http://ec.europa.eu/atwork/applying-eu-law/complaints_en.htm

¹⁷³ Enquiries and Complaints about Application of Union Law available at http://ec.europa.eu/atwork/applying-eu-law/complaints_en.htm

¹⁷⁴ Articles 24 and 228 supra note 86

It seems unlikely that the Member States intend on progressively adding to the scope of jurisdiction of the Tribunal via a form of linear progression towards eventually reaching individual access as was previously the case. Therefore a model emphasizing cooperation between national courts and the Tribunal would be ideal, whereby the Tribunal sets interpretive precedents to be applied at domestic level in line with the approach followed in the European Union.

Another striking feature is the concerted effort by the drafters to limit the scope of the legal instruments that may be brought to the court for resolution. Previously the Tribunal was empowered to hear disputes concerning the interpretation and application of the SADC Treaty; interpretation, application or validity of the protocols, all subsidiary instruments adopted within the framework of the community, and acts of the institutions of the Community. Furthermore all matters specifically provided for in other agreements that states may conclude amongst themselves and which confer jurisdiction to the Tribunal.¹⁷⁵

However, the New Protocol reflects a new reality whereby the aforementioned has now been amended to reflect a Tribunal only empowered to hear disputes between states in respect of the SADC Treaty and its ensuing protocols only. Thus removing the ability of the Tribunal deliberating over agreements between states not part of the suite of protocols annexed to the SADC treaty.

Therefore whereby previously members were entitled to conclude agreements outside the scope of the SADC Treaty and use the Tribunal as a mechanism of resolving any possible disputes that has now been removed as an option. Institutions created by the SADC Treaty and or protocols aside from the Tribunal have now also been excluded from being able to have *locus standi* before the Tribunal, thereby requiring all protocols to be redrafted to include dispute resolution mechanisms within those relevant protocols.

Another aspect of the New Protocol which requires mention is the dispute resolution procedure set out under the article 49 of the New Protocol. Similar to the Dispute Settlement Understanding of the World Trade Organisation, the principle of amicable resolution of disputes between states as the first prize without going to litigation has been imported into the New Protocol whereas

¹⁷⁵ Article 14 supra note 3

previously it did not feature. Article 49(2) states that “*any dispute arising from the application, interpretation, or implementation of this Protocol, which cannot be settled amicably, shall be referred to the SADC Tribunal*”.

Therefore, unlike previously whereby member states were entitled to immediately proceed with litigation before the Tribunal in cases of disputes arising, the position has now changed to one requiring that a Member State first attempt to amicably resolve the dispute prior to proceeding to the Tribunal. The only concern with this article is that it is very brief and does not set out any thresholds with regards to when a state can deem itself to have satisfied the requirement before proceeding to the Tribunal. Without setting thresholds parties could be locked in amicable discussions indefinitely.

Finally, the New Protocol regulates the manner in which Member States may withdraw from the New Protocol. Article 50(1) states “*A state may withdraw from this Protocol upon the expiration of twelve (12) months from the date of giving written notice to that effect to the Executive Secretary*”.

The New Protocol thus now establishes the right for states to withdraw from the protocol on the Tribunal at any moment of their choosing thus rendering the Tribunal somewhat redundant. Insofar as at what point can a Member State be held accountable when it is possible for Member States to withdraw from the New Protocol at any given point. The effect being that members can only be held accountable if they want to be held accountable, thus almost reverting back to the old GATT¹⁷⁶ principle of positive consensus which was done away with by the World Trade Organisation.

In conclusion, many have argued that the decision to redraft the Protocol would serve as the death knell in the Tribunal's judicial coffin, it must however be kept in mind that SADC's judicial architecture, perhaps more so its functioning has always exhibited room for improvement. That being said, perhaps the removal of the right to individual access represents one of the weaknesses and areas of improvement SADC needed to work on. Removing the right could perhaps strengthen the functioning of the Tribunal. However only if the right to seek preliminary rulings

¹⁷⁶ General Agreement on Trade and Tariffs, 1947

is reinstated and whereby mechanisms in Member States are put in place to enforce the SADC Treaty, though it is unlikely many will share this view.

Numerous critics of the review and redrafting of the Protocol fear that the ratification of the New Protocol in its current form will lead to a paralysed and Impaired Tribunal, which is hard to dispute in light of Member States being able to withdraw from the New Protocol rather easily, amongst other things. Perhaps what is most disappointing is not the decision to suspend and redraft the Protocol, rather the fact that the New Protocol contains the same fatal flaw as those which were in the Protocol.

The Council in conjunction with the Legal Sector and Secretariat in drafting the New Protocol should have sought to rectify the Tribunal's biggest impediment, being the inability of the Tribunal to enforce its judgments in the territories of Member States. As this leaves enforcement in the hands of the Summit which, looking at the *Campbell* case, due to its political nature has showcased its unwillingness to take the necessary measures to force states to comply with the rulings of the Tribunal leaving the Tribunal as a toothless institution serving only the narrow interests of the Summit.

V The *Campbell* Case

Land rights in Zimbabwe have been a source of domestic controversy and regional concern since Zimbabwe's independence in 1980.¹⁷⁷ The sheer controversy surrounding the topic would eventually spill over and fall squarely in the lap of the Tribunal, consequently the Tribunal was dissolved as a result. Thus the purpose of this chapter is to contextualize why land rights have been such a hot topic and how the debate landed at the doorstep of the Tribunal only to eventually lead to the Tribunal's disbandment.

The pursuit of a policy of compulsory land redistribution in the late 1990's significantly contributed to the breakdown of the rule of law in Zimbabwe in the early 2000's.¹⁷⁸ Subsequent to the failure of commercial methods to fairly redistribute land, compulsory purchase became the next option available. The Land Acquisition Amendment Act of 2000 removed the Zimbabwean government's obligation to pay full compensation for land acquired for purposes of redistribution. This allowed for the fast tracking of the resettlement phase designed to accelerate the process of land acquisition¹⁷⁹ by the Government and resettling the people of Zimbabwe.

The process of land acquisition and resettlement quickly deteriorated to a state of lawlessness as observed by the UN Committee on the Elimination of Racial Discrimination, as ex combatants of the liberation struggle began taking the law into their own hands and thus occupying farms illegally.¹⁸⁰ The land redistribution policy of the government began being executed not only by the government but also by armed gangs simultaneously.¹⁸¹ Furthermore when the Zimbabwean Supreme Court ruled the government's actions to be unlawful, the Zimbabwean constitution was amended retrospectively in 2005 to end any future litigation which may stem from the land redistribution program.¹⁸²

The abovementioned situation formed the basis of the application made to the Tribunal in the *Campbell* Case¹⁸³, in which the Tribunal had to deal with the validity of the government's land

¹⁷⁷ Frederick Cowell, "The Death of the Southern African Development Community Tribunals Human Rights Jurisdiction" Human Rights Law Review 13 (2013) 158

¹⁷⁸ Ibid at 158

¹⁷⁹ Ibid at 158

¹⁸⁰ Ibid at 158

¹⁸¹ Ibid at 158

¹⁸² Ibid at 158

¹⁸³ Ibid at 159

reform program. On 11 October 2007 Mike Campbell (Pvt) Limited and William Michael Campbell¹⁸⁴ filed an application with the Tribunal challenging the acquisition by the Zimbabwean government¹⁸⁵ of agricultural land owned by them. Simultaneously, in terms of article 28 of the Protocol, they filed an application for an interim measure restraining the Zimbabwean government from removing them or allowing their removal from their land pending a determination on the legality of the matter by the Tribunal, which was granted by the Tribunal. Subsequently, seventy seven other persons applied to intervene in the proceedings and the cases were consolidated into one case.

Regardless of the granting of the interim measures the Applicants were removed from their lands, on 20 June 2008 the Applicants referred the failure on the part of the Respondent to comply with the Tribunal's decision regarding the interim relief granted to the Tribunal. The Tribunal upon establishing the failure by the Respondent to abide by the interim orders granted in terms of article 28, referred the matter to the Summit pursuant to article 32(5) of the Protocol for enforcement action. The aforementioned failure by the Respondent in hindsight can be seen as the opening salvo fired by the Respondent in deligitimising the Tribunal which ultimately led to the Tribunal's suspension and disbandment.

Subsequent to referring the Respondent's matter to the Summit, the Summit in terms of article 32(5)¹⁸⁶ was tasked with taking appropriate actions in order to force Zimbabwe to honour its obligations under the SADC Treaty and the Protocol. However, the Summit failed to take any action with regards to the Respondent's failure to prevent the Applicants removal from their land.

In its deliberation on the compulsory acquisition of the Applicants agricultural land under the land reform program, the Tribunal began by noting that the acquisition of land in Zimbabwe had a long history but chose, for purposes of the case, to confine itself to the land acquisition carried out under section 16B of the Constitution of Zimbabwe (Amendment No.17, 2005) ("Amendment 17"). The aforementioned thus restricting the Tribunal's thought processes solely to the legality of the land redistribution program, which is unfortunate as due to the continents

¹⁸⁴ herein after referred to as "the Applicants"

¹⁸⁵ herein after referred to as "the Respondent"

¹⁸⁶ Supra note 3

colonial past, land redistribution is a matter which is bound to be contentious and thus should be viewed holistically in order to be able to arrive at lasting solutions.

Amendment 17 to the Constitution of the Republic of Zimbabwe provides *inter alia* that agricultural land may be acquired by the government for purposes of resettlement in order to give effect to the government's land reform policy.¹⁸⁷ Amendment 17 further determines that land acquired vests in the state and no compensation shall be payable to the owners except for any improvements effected on such land before it was acquired. Furthermore Amendment 17 ousted the jurisdiction of the Zimbabwean courts to entertain any challenge concerning such acquisitions¹⁸⁸ except insofar as the amount of compensation payable for any improvements effected on the land before it was acquired.

In its application of Amendment 17, the Respondent acquired the agricultural land of mostly white commercial farmers in Zimbabwe, consequently the Applicants approached the Tribunal submitting as follows:

“the Respondent acted in breach of its obligations under the Treaty by enacting and implementing Amendment 17; all the lands belonging to the Applicants which have been compulsory[Sic] acquired by the Respondent under Amendment 17 were unlawfully acquired since the Minister who carried out the compulsory acquisition failed to establish that he applied reasonable and objective criteria in order to satisfy himself that the lands to be acquired were reasonably necessary for resettlement purposes in conformity with the land reform programme; the Applicants were denied access to the courts to challenge the legality of the compulsory acquisition of their lands; the Applicants had suffered racial discrimination since they were the only ones whose lands have[Sic] been compulsory[Sic] acquired under Amendment 17, and the Applicants were denied compensation in respect of the lands compulsorily acquired from them”.¹⁸⁹

The Respondent in turn argued *inter alia* as follows:

“the Tribunal has no jurisdiction to entertain the application under the Treaty; the premises upon which acquisition of lands was started was on a willing buyer willing

¹⁸⁷ Werner Scholtz & Gerrit Ferreira, “*Much Ado About Nothing? The SADC Tribunal’s Quest for the Rule of Law Pursuant to Regional Integration*” at 334

¹⁸⁸ *Ibid*

¹⁸⁹ *Supra* note 8 at 12

*seller basis and that the land was to be purchased from white farmers who, by virtue of colonial history, were in possession of most of the land suitable for agricultural purposes; the Respondent continues to acquire land from mainly whites who own large tracts of land suitable for agricultural resettlement and this policy cannot be attributed to racism but to circumstances brought about by colonial history; the Respondent had also acquired land from some of the few black Zimbabweans who possessed large tracts of land; the Applicants will receive compensation under Amendment 17; the compulsory acquisition of lands belonging to Applicants by the Respondent in the context must be seen as a means of correcting colonially inherited land ownership inequities, and the Applicants have not been denied access to the courts. On the contrary, the Applicants could, if they wish to, seek judicial review”.*¹⁹⁰

Against the abovementioned background, the Tribunal determined that the following issues required adjudication, namely:

1. Whether or not the Tribunal has jurisdiction to entertain the application.
2. Whether or not the Applicants have been denied access to the courts in Zimbabwe.
3. Whether or not the Applicants have been discriminated against on the basis of race.
4. Whether or not compensation is payable for the lands compulsorily acquired from the Applicants by the Respondent.

Jurisdiction

In deciding the question of the Tribunal's jurisdiction, it is to be noted that upon the Applicants bringing the dispute to the Tribunal, they had first instituted proceedings in the Supreme Court of Zimbabwe with regards to the acquisition of their agricultural lands. In the Applicants bringing their application to the Tribunal, the Supreme Court of Zimbabwe was still seized with the matter and had at the time of launching the application yet to give a ruling thus it came as no surprise that upon bringing the application to the Tribunal, the Respondent reacted by raising the issue as to whether or not the Tribunal had the jurisdiction to hear the matter as the Supreme Court of Zimbabwe had yet to deliver a judgement. Therefore the Respondent averring that the Applicants had yet to exhaust all available remedies as required by article 15(2) of the Protocol.

¹⁹⁰ Supra note 8 at 14

In deciding the issue, the Tribunal referred to Amendment 17 in terms of which the jurisdiction of the Zimbabwean Courts had been ousted insofar as the acquisition of agricultural land by the Respondent was concerned. The Applicants were thus in terms of Amendment 17 unable to institute proceedings in the courts of Zimbabwe insofar as the acquisition of agricultural land was concerned. This was later confirmed by the Supreme Court of Zimbabwe. In its ruling of 22 February 2008 the Court stated that “*by clear and unambiguous language of the Constitution, the Legislature, in the proper exercise of its powers, had lawfully ousted the jurisdiction of the courts of law from any of the cases in which a challenge to the acquisition of agricultural land may be sought*”¹⁹¹, settling the question regarding the Applicant’s duty to exhaust all available remedies.

The Respondent also submitted that the SADC Treaty contains no standards as to which a Member States conduct can be judged and that in the absence of the same, such standards cannot be imported from other international documents. Furthermore that none of the protocols adopted under the SADC Treaty referred to agrarian reform and human rights, suggesting that in absence of same the Tribunal had no jurisdiction to rule on its land reform policy, an attempt to box the Tribunal into a corner insofar as only applying strict legal interpretations and not developing its jurisprudence.

The Tribunal in dealing with the matter rejected the Respondent’s arguments by referring to article 21(b) of the Protocol which empowers the Tribunal with the power to develop its own jurisprudence but also instructs the Tribunal to do so by also taking into account applicable treaties and general principles of public international law therefore settling the issue. The Tribunal also pointed out that in terms of jurisdiction, article 27 of the Vienna Convention on the Law of Treaties prohibits the Respondent from invoking provisions of its national law (Amendment 17) as a justification for the failure to carry out international agreements.¹⁹²

¹⁹¹ *Mike Campbell (Pty) Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement* (SC 49/07)

¹⁹² Scholtz & Ferreira op cit note 187 at 338

Access To Court & Right To Fair Hearing

The second issue before the Tribunal was whether or not the Applicants had been denied access to the courts, furthermore whether they had been denied a fair hearing due to Amendment 17.¹⁹³ Member States are obliged to respect, promote and protect these two fundamental rights.¹⁹⁴ The Tribunal based its reasoning on the viewpoint that the rule of law embraces these rights and article 4(c) of the SADC Treaty obliges Members to respect the principles of human rights, democracy and the rule of law.¹⁹⁵ The Tribunal stating that:

*“it is settled law that the concept of the rule of law embraces at least two fundamental rights, namely, the right of access to courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation”.*¹⁹⁶

The Tribunal accordingly attended to discussing the right to access to the courts via extensive reference to decisions of regional and national courts as well as quasi-judicial bodies.¹⁹⁷

In relation to the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation, the Tribunal held that it is a principle *“well recognised and entrenched in law”*.¹⁹⁸ The Tribunal considered the relevant sections of Amendment 17 and held that the provisions of section 18(1) and (9) concerning the constitutional right to protection of law and a fair hearing have been taken away in relation to land acquired under section 16B(2)(a).¹⁹⁹ The Tribunal cited the Supreme Court’s explicit acknowledgement of this in its judgement.²⁰⁰ The Tribunal found in favour of the Applicants stating that the Respondents had breached article 4 of the SADC Treaty²⁰¹.

Racial Discrimination

The other issue raised by the Applicants, if not the most pertinent issue raised in their application before the Tribunal, was that of racial discrimination. The Applicants contended that that the

¹⁹³ Scholtz & Ferreira op cit note 187 at 339

¹⁹⁴ Supra note 8 at 27

¹⁹⁵ Scholtz & Ferreira op cit note 187 at 339

¹⁹⁶ Supra note 8 at 26

¹⁹⁷ Scholtz & Ferreira op cit note 187 at 339

¹⁹⁸ Supra note 8 at 35

¹⁹⁹ Scholtz & Ferreira op cit note 187 at 339

²⁰⁰ Ibid

²⁰¹ Ibid

land reform program was based on racial discrimination in that it targeted white Zimbabwean farmers only.²⁰² The Applicants further argued that Amendment 17 was intended to facilitate or implement the land reform policy of the Respondent based on racial discrimination.²⁰³ The Applicants alleged that the Respondent, in the execution of the land reform program, did not take into account whether the land targeted was acquired during the colonial period or not. The Applicants therefore submitting that the policy although designed to redress the imbalances created during the colonial period, in effect directed that no person of white colour or European origin was to be allowed to retain ownership of a farm, although not specifically referring to race.

The Respondent refuted the allegations made by the Applicant, arguing that not only white farmers were targeted but that the land reform program acquired farms suitable for agricultural purposes. Furthermore that such farms happened to largely be owned by white Zimbabweans which was inevitable due to Zimbabwe's colonial history. The Respondent also claimed that agricultural land of black farmers had also been acquired, moreover that certain white farmers had been issued with 99 year leases in respect of agricultural lands.

The the question the council was seized with was whether or not Amendment 17 violated article 6 of the SADC Treaty prohibiting discrimination. The Tribunal in setting about its tasks considered and noted various international and regional instruments prohibiting discrimination in all forms, going on to state that "*the question is whether, in the absence of the explicit mention of the word „race“ in Amendment 17, that would be the end of the matter*".²⁰⁴

The Tribunal held that since the effects of the implementation of Amendment 17 were to be felt only by white Zimbabwean farmers, although Amendment 17 not explicitly referring to white farmers, its effect is only in respect of white farmers and consequently constitutes indirect discrimination or substantive discrimination.²⁰⁵

The Tribunal went on further to state:

²⁰² Supra note 8 at 41

²⁰³ Ibid at 43

²⁰⁴ Ibid at 52

²⁰⁵ Supra note 8 at 53

*“In examining the effects of Amendment 17 on the applicants, it is clear to us that those effects have had an unjustifiable and disproportionate impact upon a group of individuals distinguished by race such as the Applicants. We consider that the differentiation of treatment meted out to the Applicants also constitutes discrimination as the criteria for such differentiation are not reasonable and objective but arbitrary and are based primarily on considerations of race. The aim of the Respondent in adopting and implementing a land reform programme might be legitimate if and when all lands under the programme were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups”.*²⁰⁶

The Tribunal concluded its ruling on racial discrimination stating:

*“if: (a) the criteria adopted by the Respondent in relation to the land reform programme had not been arbitrary but reasonable and objective; (b) fair compensation was paid in respect of the expropriated lands, and (c) the lands expropriated were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups, rendering the purpose of the programme legitimate, the differential treatment afforded to the Applicants would not constitute racial discrimination”.*²⁰⁷

Compensation

Lastly insofar as compensation is concerned, the Applicants argued that the Respondent breached its obligations under international law by failing to compensate them for the expropriated land.²⁰⁸ In a surprise twist, the Respondent did not dispute the entitlement of the Applicants to compensation but merely alleged that compensation was the duty of the former colonial power, Britain, based on the independence agreement concluded between Zimbabwe and Britain in 1978.²⁰⁹

The Tribunal found that, in terms of section 16B(2)(b) which excluded payment of compensation for agricultural land acquired for resettlement purposes, in this regard the Tribunal found the applicants to have a right to compensation and the Respondent a duty to pay fair compensation under international law.²¹⁰ It was held that that the Respondent could not seek refuge under its national laws in order to avoid its international law obligation to pay compensation. The Tribunal

²⁰⁶ Ibid

²⁰⁷ Ibid at 54

²⁰⁸ Scholtz & Ferreira op cit note 187 at 342

²⁰⁹ Ibid

²¹⁰ Scholtz & Ferreira op cit note 187 at 342

ordered the Respondent to take all necessary measures to ensure the Applicants ownership and possession of their lands was not disturbed pursuant to Amendment 17 and that those already evicted be paid fair compensation. However the Tribunal made no determination on damages but ordered Zimbabwe to comply with international law.

As a general rule of thumb courts, in this case the Tribunal, should look to pass judgments and/or orders which are enforceable and are lasting as the right to access to court would be an illusion unless orders made by courts were capable of being enforced by those in whose favour such orders are granted.²¹¹ In this regard, the Tribunal in considering land redistribution in Zimbabwe with its contentious history should have sought to look at the issue holistically bearing in mind the history of colonialism and the displacements which took place as a result. The topic of land in Zimbabwe was at the time of the *Campbell* case and remains to this very day a matter which affects the boni mores, it can be argued that it is somewhat unreasonable to expect ordinary people to respect and abide by judgments on contentious issues when the rationale used is that of strict legal interpretation which does not open itself up to considerations regarding the history surrounding the issue, a governments' ability to enforce a judgment as well as the general boni mores.

The Tribunal in rendering its judgement was required to examine the issue of racial discrimination as the Applicants had alleged that Amendment 17 targeted white people only, although the Respondents had contended that black farmers' land has also been acquired under Amendment 17. The Tribunal in its judgement was of the opinion that the effects of Amendment 17 would be felt only by white farmers and that those effects had an unjustifiable and disproportionate impact on a group of individuals distinguished by race. The Tribunal's decision in this regard is puzzling as the Respondent had argued that agricultural land had also been acquired from black farmers yet the Tribunal makes no mention of whether or not it took the aforementioned into consideration and furthermore what weight was assigned thereto. What is particularly puzzling is that due to agricultural land being acquired from both black and white farmers it seems to contradict the Tribunal's finding that the effects will only be felt by white farmers.

²¹¹ *Government of the Republic of Zimbabwe v Fick and others* (CCT 101/12) [2013] ZACC 22 at 31

The Tribunal whilst seized with the issue of possible racial discrimination legislated under Amendment 17 rightly sought to examine substance over form, insofar as looking at whether or not even though Amendment 17 did not explicitly refer to race. Rather whether its implementation would only affect white farmers. In carrying this examination out the Tribunal could've and possibly should have looked at the history of the land issue in Zimbabwe and it would have seen why the issue had become so contentious and why it would mostly affect white farmers, however not exclusively white farmers. Specifically, the Tribunal should have referred to the Lancaster House Agreement.²¹²

The Lancaster House Agreement preserved the right to private property in the face of the burning issue of land redistribution at the time. However it also provided that Zimbabwe's former colonial authority, Britain, under the leadership of the government of Margaret Thatcher would provide the resources necessary to purchase the land for redistribution as the Lancaster House Agreement entrenched the willing buyer and willing seller principle.²¹³

With that agreed the land question was settled, however in 1997 with the fall of the Thatcher government and the arrival at 10 Downing Street of the Labour Party under the leadership of Tony Blair, Britain unilaterally reneged on its obligations under the Lancaster House Agreement.²¹⁴ Minister of Overseas Development Clair Short informed the Zimbabwean government that the election of a new government "*without links to former colonial interests*"²¹⁵ meant that Britain no longer had "*any special responsibility to meet the cost of land purchases*".²¹⁶

Therefore, a previously negotiated solution which „settled“ a burning issue which plagued Zimbabwe prior to its independence, was cast wide open and thus irrevocably altering the countries political climate. With this in mind it is unlikely that the Lancaster House Agreement would have been signed with the property clause in its current form, furthermore that the Constitution of Zimbabwe which transposed the principles enshrined in the Lancaster House

²¹² The Lancaster House Agreement was a political solution which brought about the independence of Zimbabwe from Rhodesian Rule, the agreement was signed on 21 December 1979

²¹³ M Mupandawana "Britain's Colonial Obligations and Land Reform in Zimbabwe" available at <http://www.thinkir.co.uk/of-britains-colonial-obligations-and-land-reform-in-zimbabwe/>

²¹⁴ UK's Betrayal Led to Zims Land Grabs London Mayor available at <http://m.news24.com/news24/africa/zimbabwe/uks-betrayal-led-to-zims-land-grabs-london-mayor-20150224>

²¹⁵ Mpundwana op cit note 213

²¹⁶ Mpundwana op cit note 213

Agreement regarding the right to private property would more than likely have been altered drastically. Thus the Tribunal should have taken this into consideration when applying its mind to the issues at hand.

Furthermore, the Tribunal observed that it would have reached a different conclusion if the state's criteria in confiscating land had been reasonable and objective, if fair compensation had been paid for expropriated lands, and if these lands had been distributed to poor, landless and other disadvantaged individuals or groups²¹⁷. However the observations made by the Tribunal are rather general and do not provide much guidance as to how a Member State could attempt to go about enacting a lawful land reform policy.

First, insofar as "reasonable and objective criteria" are concerned it is interesting that the Applicant submitted various criteria that it thought should have been considered by the Respondent prior to acquiring the agricultural land. Criteria including whether the land targeted was acquired during the colonial period or not²¹⁸, which seems to be a valid argument regarding criteria which should be taken into account. The Tribunal made no pronouncements in this regard which is unfortunate.

Secondly, with regards to "fair compensation", section 16B (2)(b) of Amendment 17 explicitly sets out that "*no compensation shall be payable for land...except for any improvements effected on such land before it was acquired*". From the aforementioned one can gather that the Applicants although not being entitled to compensation for the land, were presumably entitled to compensation for built up structures on the land as it would likely constitute an improvement. The question then becomes whether or not the Applicants should be entitled to compensation for lands which were acquired under various colonial legislation including the Land Apportionment Act of 1930.²¹⁹ The aforementioned formalized the acquisition of the countries best endowed land, by evicting the indigenous peoples who initially lived on it, assigning title to white farmers

²¹⁷ Nathan op cit note 6 at 875

²¹⁸ Supra note 8 at 42

²¹⁹ Hereinafter referred to as "the Land Apportionment Act"

of European descent.²²⁰ Resettling the indigenous peoples to inferior lands not suitable for farming.

The patterns of land allocation under colonial rule were thus defined in terms of conquest²²¹. For instance, under the Land Apportionment Act, some fifty one per cent of land was reserved for white settlers (who numbered about fifty thousand), thirty per cent for African reserve areas (for about one million blacks), and the remainder for commercial companies and the colonial government.²²² With this in mind and taking cognizance of the Tribunals observation of “fair compensation”, would it be fair for the government of Zimbabwe to pay compensation for land acquired by way of the conquest and eviction of the indigenous tribes who once occupied the land? Whilst always remaining cognisant of Zimbabwe’s struggling economy and the renegeing by the British government of its obligations to assist in the purchase of land for purposes of land.

Lastly, insofar as to whether or not the lands were distributed to poor, landless and other disadvantaged individuals or group, the Tribunal’s approach in this regard is commendable as it seeks to hold the Respondent accountable to its people in land redistribution. The fact that the land redistribution policy was eventually corrupted through its application however does not invalidate the merits of the program in principle.

Subsequent to their victory in the *Campbell* case, the Applicants approached the Zimbabwean courts to register the Tribunals decision, as required by article 32 of the Protocol the enforcement of foreign judgments being regulated by the common law in Zimbabwe. The order sought by the Applicants was heard by the High Court of Zimbabwe (“the High Court”) in the *Gramara* Case²²³, pursuant to the Tribunals decision on 28 November 2008. The High Court in delivering its judgement noted that with respect to article 32²²⁴ which states -

1. *the law and rules of civil procedure for the registration and enforcement of foreign judgements in force in the territory of the Member State in which the judgement is to be enforced shall govern enforcement.*

²²⁰ Lloyd Sachikonye “The Land is the Economy: Revisiting The Land Question” African Security Review Vol 14 (3), 2005 at 1

²²¹ Ibid

²²² Ibid

²²³ Supra note 9

²²⁴ Supra note 3

2. *Member States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.*
3. *Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the Member States concerned.*
4. *Any failure by a Member State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned.*
5. *If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action.*

The High Court observed that the overall effect of the abovementioned provisions is that the decisions of the Tribunal are binding and enforceable within the territories of Member States which are obliged to take all necessary measures for the execution of those decisions. However the domestic rules of procedure of each Member State govern the enforcement of a given judgment in the territory of that state.²²⁵ The High Court further noted that it was common cause that Zimbabwe had not domesticated the SADC Treaty or the Protocol, nevertheless agreeing with the Applicant that a state cannot invoke its own domestic deficiencies in order to avoid or evade its international obligations or as a defense to its failure to comply with those obligations. The High Court however rejected the Applicants assertion that the primacy of treaty obligations at international law must be taken into account in applying domestic law at the municipal level, even where there's a clear conflict between the two regimes.²²⁶

The High Court in determining the matter settled that the issues for determination were first, whether or not the Tribunal had the necessary jurisdictional competence to hear the matter and secondly whether the enforcement of the judgment would be contrary to public policy. Insofar as the jurisdictional competency the court stated:

“...all the Member States, including Zimbabwe, concluded and signed the Agreement Amending the Protocol on Tribunal on the 3rd of October 2002. By virtue of Articles 16 and 19 of this Agreement, Articles 35 and 38 of the Protocol of the Tribunal, which

²²⁵ Supra note 9 at 4

²²⁶ Ibid at 5

*required ratification of the Protocol by two-thirds of the Member States, were repealed in total, thereby obviating the need to ratify the Protocol*²²⁷.

Furthermore, *“To conclude this aspect of the case...On the 14th of August 2001, the Amendment Agreement was signed by 13 out of the 14 Heads of State or Government of the Member States, including Zimbabwe, thereby concluding the process of its adoption and entry into force”*. The High Court therefore ruling that the Tribunal was duly within its jurisdictional competencies to hear the matter.

Lastly, with regards to the matter of public policy, the High Court noted that what constitutes public policy in any given country is a matter that eludes precise definition as the notion of public policy varies with time, place and circumstance in tandem with the changing social mores.²²⁸ The High Court went on to further say that for purposes of the present case it would be contrary to public policy for any state to violate its international obligations within its own domestic realm.²²⁹ The High Court stating that *“every State party to a treaty in force is required to perform its obligations in good faith and, concomitantly, it cannot invoke its municipal law so as to absolve itself from its obligations at international law”*.²³⁰

The High Court upon citing various domestic case law noted that, customary international law forms part of the law of Zimbabwe except to the extent that it conflicts with a statute or judicial precedent²³¹. Thus intimating that even though Zimbabwe was bound to the SADC Treaty in terms of international law as referred to above, it would be against Zimbabwean public policy not to recognise and enforce decisions of the Tribunal at municipal level unless the decision conflicts with a statute or judicial precedent.

The High Court furthermore stated that, as a general rule by signing the SADC Treaty Zimbabwe created an enforceable legitimate expectation that it would adhere to the decisions of the Tribunal and would take steps to enforce those decisions in the domestic sphere as a matter of

²²⁷ Supra note 9 at 12

²²⁸ Ibid at 14

²²⁹ Ibid

²³⁰ Ibid

²³¹ Ibid at 15

public policy.²³² However, the High Court went on to state that in its opinion the application of the general rule should be subject to a consideration of the facts on a case by case basis.²³³

Finally, the High Court noted section 3 of the Constitution of Zimbabwe²³⁴ which reaffirms the constitution as the supreme law of the country and to the extent any other law is inconsistent with the constitution that law is void. The High Court then stated that:

“The obvious implications of the supremacy of the Constitution are twofold. Firstly, to the extent that the common law is invoked to enforce a foreign judgment, the common law must be construed and applied so as to conform with the Constitution and any feature of the judgment that conflicts with the Constitution cannot, as a matter of public policy, be recognised or enforced in Zimbabwe. The notion of public policy cannot be deployed and insinuated under cover of the common law to circumvent or subvert the fundamental law of the land. Secondly, I consider it to be patently contrary to the public policy of any country, including Zimbabwe, to require its government to act in a manner that is manifestly incompatible with what is constitutionally ordained”.

The High Court thus with this in mind also observed that the enforcement of the judgment would entail the eviction and upheaval of many of the beneficiaries of the land reform program whom the court noted also had a legitimate expectation that the government would implement the land reform program and fulfil their aspirations under it bearing in mind the history of the land question in Zimbabwe. The High Court thus found that the enforcement of the judgment would be contrary to public policy.

In conclusion, in light of the above it is clear that the issue of land rights is a contentious matter, furthermore that the Tribunal in deliberating over the matter perhaps was not aware as to how delicate an issue it was in Zimbabwe, not to say that this would have influenced the Tribunal's decision. However, when analyzing the impact the Tribunal's decision was to have on Zimbabwe it is understandable why the Zimbabwean government chose to take issue with the Tribunal's decision. It is submitted that the Tribunal did not pay enough attention to the matter of public policy when arriving at its conclusion, to which the High Court did. Public policy should have

²³² Supra note 9 at 16

²³³ Ibid

²³⁴ The Constitution of Zimbabwe Amendment (Act 20) Act 2013

been one of the considerations receiving attention by the Tribunal when adjudicating on the matter bearing in mind that as African judges they were acutely aware of the effects of colonialism on the continent. In failing to do so perhaps the Tribunal missed a great opportunity to set judicial precedent unique to any other jurisdiction in the world.

VI The Conflict of Laws

The aim of this chapter is to explore the conflict of laws which presented itself upon the Applicants attempt to have the Tribunal's order enforced by the Zimbabwean High Court. The focus specifically being with regards to the debate between a nation's public policy versus that of a foreign judgment.

The idea of land redistribution regardless of the context is always likely to raise ire of certain members in society, none more so than those members of society from whom land is being acquired for purposes of the redistribution. The outrage brought about by the loss of security of title is always going to be even more contentious when taking cognisance of the various competing interests between those benefitting from land redistribution and those affected by it, the proverbial debate between the "haves" and the "have not's". It should therefore have come as no great surprise that upon the Applicants in the *Campbell* Case attempting to enforce their landmark judgment from the Tribunal, insofar as having it domesticated and converted to an order of court, they would rub up against a great many challenges as witnessed in the *Gramara* Case.

What was of great interest in the *Gramara* Case was how the debate regarding the interests of the "haves" i.e. the Applicants and "have not's" i.e. the beneficiaries of land redistribution, played themselves out in the High Court's judgment. Particularly with regards to the issue as to whether or not the recognition and enforcement of the Tribunal's decision would be contrary to public policy in Zimbabwe. The reason this is of interest is that the High Court decided upon the issue of the recognition and enforcement of the Tribunal's decision according to public policy, a concept with no concrete definition.

The High Court in working through the various submissions made by both the Applicants and the Respondents and coming to a decision insofar as the issues requiring determination sought guidance from South African law regarding the enforcement of a foreign judgment. In South Africa, it is well established that foreign judgments are recognizable and enforceable under the

common law.²³⁵ The High Court looked at the general requirements for recognition and enforcement of foreign judgments in South Africa, namely:

“ (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as „international jurisdiction or competence”)

(ii) that the judgment is final and conclusive in its effect and has not become superannuated;

(iii) that the recognition and enforcement of the judgment by our Courts would not be contrary to public policy;

(iv) that the judgment was not obtained by fraudulent means;

(v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and

(vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended”.²³⁶

Upon working through the abovementioned requirements, the High Court accepted that, without having been directed by either counsel to Zimbabwean authorities stating the contrary, the common law of Zimbabwe was *ad idem* with the common law position of South Africa in this regard.²³⁷ In so doing therefore categorising the decisions of the Tribunal, a quasi-judicial body, as foreign judgments in the strict sense of the phrase i.e. judgments from other jurisdictions. From the abovementioned requirements the High Court extracted the issues of jurisdictional competence and public policy as those which required determination.

The matter of public policy is a fascinating issue as the term “public policy” evades precise definition. This is as a result of the fact that the nature of public policy is not static, but varies from time to time²³⁸ and from place to place.²³⁹ Accordingly, attempting to define “public

²³⁵ Supra note 9 at 6

²³⁶ Ibid at 7

²³⁷ Ibid at 6

²³⁸ Cf *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 2 All SA 583 (A); 1984 4 SA 874 (A) 874.

policy”, a chameleon like concept is no easy task though many authors and academics have attempted to.

For instance some would define public policy quite simply as what governments do and neglect to do, public policy therefore being the politics of resolving conflicts about resources, rights and morals.²⁴⁰ Woodrow Wilson, the father of the league of nations, defined public policy to be “*the laws and regulations which are made by legislative statesmen and implemented by public administration personnel*”²⁴¹; Harold Lasswell and Abraham Kaplan define public policy as “*a projected program of goals*”²⁴² and Lastly Thomas R. Dye was of the opinion that Public policy is “*whatever governments choose to do or not to do*”.²⁴³

If we are to accept that public policy is not a static concept but rather one which varies in accordance to the times, a reasonable assertion, then the High Court’s reasoning in treating the enforcement of foreign judgments as a matter requiring deliberation on a case by case basis is persuasive. This being as a result of the fact that at common law as part of the requirements of enforcing a foreign judgment is the inherent requirement that the judgment must not be contrary to public policy. Therefore, if public policy is an ever changing chameleon like concept, it would be inappropriate to presume to use a concrete approach when attempting to satisfy the requirement, as what was public policy in days gone by may not be public policy today.

In light of the above, a question which begs answering is whether or not it was appropriate for the High Court to decide the matter on a concept with so little certainty as that of public policy. The discussion which takes place below should not be construed as a criticism of the use of public policy to decide the matter but rather an observation into how, although peculiar, the basis for such is sound in law. Furthermore that the Tribunal should also perhaps have paid greater attention to the role of public policy when coming to its decision as the High Court did so correctly in the circumstances.

²⁴⁰ R Klein T R Marmor edited by M Moran, M Rein and R.E. Goodin “*The Oxford Handbook of Public Policy*” Oxford University Press (2006) at page 892

²⁴¹ R Huang “*On the Nature of Public Policy*” Chinese Public Administration Review Vol 1, Number 3 of 4 at page 275

²⁴² Ibid at 276

²⁴³ Ibid

In coming to its decision with regards to the recognition and enforcement of the Tribunals decision the High Court sought guidance from South African and English law. Having already established the South African position, it would not be amiss to consider how the aforementioned is dealt with in the European Union and in Britain. Insofar as the European Union is concerned, Council Regulation (EC) No 44/2001 of 22 December 2000²⁴⁴, regulates the recognition and enforcement of judgements in civil and commercial matters.

In terms of the Brussels I Regulation, there are a very limited range of exceptions in which the recognition and enforcement of a judgement by EU member states must be refused. Exceptions covered in articles 34-5 and 45(1).²⁴⁵ The exceptions under the aforementioned articles are an exhaustive list and include judgements whose recognition would be incompatible with public policy, default judgments where the defendant was not served with the originating documents in sufficient time and in such a way as to enable him to arrange for his defence, and in a very limited range of situations whereby judgements given in proceedings over which the original court lacked jurisdiction.²⁴⁶ For purposes of this discussion, the focus shall be solely with regards to the public policy ground of refusal to recognise and enforce a judgment. The Court of Justice has consistently emphasised that the public policy proviso found under article 34(1) should operate only in exceptional circumstances and that the limits of the concept are to be determined by the Court of Justice.²⁴⁷

Recourse to public policy, in order to refuse to recognise and enforce a judgement, can be envisaged only where recognition or enforcement of the judgement would be at a variance to an unacceptable degree with the legal order as it infringes a fundamental principle of the state.²⁴⁸ The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state, or of a right recognised as fundamental within that legal order.²⁴⁹ Under article 34(1) there are five identifiable categories under which public policy may be invoked.

²⁴⁴ Herein after referred to as the “Brussels I Regulation”

²⁴⁵ Peter Stone “*EU Private International Law*” 2 ed Edward Elgar Publishing Limited (2010) at 229

²⁴⁶ Ibid at 230

²⁴⁷ Ibid at 239

²⁴⁸ Ibid

²⁴⁹ Ibid

First, despite proper notification of the institution of the original action, a party was in some manner or the other denied a reasonable opportunity to present his case, or was otherwise prejudiced by the use by the court of a procedure considered to be unfair by the standards of the state requested to enforce the judgement.²⁵⁰ Secondly, where the court considers that the recognition of the judgement would be unconscionable because of the outrageous character of the substantive rule applied by the original court i.e. the court upholding and enforcing a contract to pay a fee to an assassin²⁵¹. Thirdly, where the recognition of the judgement would be contrary to the political interests of the state addressed in the conduct of its economic or foreign policies. Fourthly, where cogent evidence has been discovered since the judgement was given, but there is no manner of reopening the matter in the country of origin.²⁵² Lastly, where there are irreconcilable judgements given by courts of different countries and there is no applicable provision dictating which of them should prevail.²⁵³

When considering the abovementioned categories, it is clear that the refusal of the High Court could adequately fall into the third category due to the rather wide ambit of the number of issues which could be seen as fitting into this category. An indication that the High Court's reasoning was not beyond the realms of legal reasoning.

When considering the British position on the abovementioned, it is a well-established principle of the courts of Britain that no action shall be entertained that would be contrary to the British doctrine of public policy. Notwithstanding that the right sought to be enforced was legitimately acquired under the laws of the country of origin.²⁵⁴ The bar to the enforcement of a right i.e. judgments, can include considerations of public policy at common law. Public policy in this sense is with regards to the concept of morality and justice.²⁵⁵

In practice, British courts have only applied this restraint in circumstances such as where the fundamental conceptions of British justice have been disregarded; where the British conception of morality has been disregarded; where the enforcement of the transaction would prejudice the interests of the United Kingdom or its good relation with foreign powers; lastly where a penal

²⁵⁰ Stone op cit note 245 at 240

²⁵¹ Ibid at 243

²⁵² Ibid at 244

²⁵³ Ibid

²⁵⁴ E Crawford "International Private Law" W.Green & Son Limited (1998) at 34

²⁵⁵ Ibid at 35

condition of status would be involved offending against British conceptions of human liberty and freedom of action.²⁵⁶ In the British context it is accepted that the use of public policy in the conflict of laws should be more restricted than in domestic law, its scope narrower.²⁵⁷

Taking into consideration the position of the European Union and Britain insofar as the enforcement of foreign judgments are concerned, it's clear that the ever changing concept of public policy is a consideration which can legitimately be taken into consideration and used to choose not to enforce a foreign judgment. Thereby lending legitimacy to the High Court's judgment but more specifically the High Court's decision to use public policy as the axel upon which to rule against the Applicants in enforcing the Tribunals decision.

When considering the *Gramara* Case it would seem that what played itself out before the High Court was a conflict of laws in the recognition of a foreign judgment. The High Court did not specifically set out to deal with this in its judgment but does indirectly make mention of it when referring to the enforcement of the Tribunal's judgments. The High Court cited article 32 of the Protocol and determined that the overall effect of the provision was that the decisions of the Tribunal are binding and enforceable, however, their enforcement was governed by the rules of civil procedure of each Member State as mentioned in chapter 3.

The High Court went on further to correctly side with the Applicants in their argument that although Zimbabwe had failed to take any specific internal measures to domesticate the SADC Treaty or the Protocol as required, Zimbabwe could not evade its international obligations by invoking its own domestic deficiencies. The Applicants citing the international law principle of the "*pacta sunt servanda*".

However, the High Court disagreed with the applicant's assertion that states when applying domestic law at municipal level must take into consideration their treaty obligations even when a clear conflict between the two regimes presents itself. In other words, the Applicants contended that states' international obligations to SADC took precedence over Zimbabwe's municipal laws. In disagreeing with this line of argument the High Court stated:

²⁵⁶ Crawford op cit note 254 at 35

²⁵⁷ Ibid

*“... Route Touts BV & Others v Minister of National Security Responsible for Land, Land Reform and Resettlement & Others”²⁵⁸ it was said that “On the pragmatic approach that has come to be adopted in international practice, neither legal system enjoys primacy over the other. In principle, they both hold sway and supremacy in their respective domain... The resultant divergence between the two systems is reconciled on the basis that the State incurs international responsibility for having violated its international obligations and must accordingly effect the requisite reparations in order to satisfy its international responsibility”.*²⁵⁹

The High Court therefore being of the view that international law does not enjoy primacy over domestic legislation. Furthermore that should a situation arise whereby a state defaults on its treaty obligations as a result of a divergence between the two legal systems, the state would have to pay reparations to satisfy its international obligations. Presumably saying that Zimbabwe would likely have to resolve the issue through diplomatic channels as opposed to the courts.

The conflict of laws thereby playing itself out with regards to Zimbabwe’s domestic laws i.e. the supremacy of the constitution and the constitutionally entrenched right to acquire agricultural land for purposes of resettlement in accordance with Amendment 17 versus its treaty obligations insofar as the SADC Treaty was concerned and Zimbabwe’s commitments thereto.

Practically, recognising and enforcing the Tribunal’s judgment would compel the Zimbabwean government to act contrary to a law legally enacted by parliament, what was particularly problematic was that the empowering legislation was the constitution and wherein the constitution is supposed to be the supreme law of the land. To work around this the High Court sought to invoke considerations of public policy in order to refuse to recognise and enforce the Tribunal’s judgment, which as demonstrated has valid legal grounds.

Lastly, it should be noted that the failure to recognise and enforce foreign judgements is not peculiar to Zimbabwe nor the African continent for that matter. In cases where individuals have sought to enforce judgments of international courts, national courts have often been reluctant to recognise and/or enforce such judgements, for instance in *Socobel v Greek State*, a company

²⁵⁸ Supra note 9 at 5

²⁵⁹ Ibid

sought to enforce a judgment of the Permanent Court of International Justice before a Belgian national court.²⁶⁰ The action failed as a result of the company having not been a party to the action before the Permanent Court, the Belgian Court found it inconceivable that a party which was not admitted to the bar of an international court could be able to rely on a decision in a case to which it was not a party.²⁶¹

Furthermore, recently the Supreme Court in the United States held that a judgment of the International Court of Justice was not directly enforceable as domestic law and could therefore not prevail over state procedural rules.²⁶² A clear example of how murky and muddled the waters get when attempting to enforce foreign and/or international court decisions through national courts.

In conclusion, upon having observed the position in South Africa, Britain and the European Union with regards to the enforcement of foreign judgments, it is clear the public policy can and as demonstrated has been used as reason not to enforce a foreign judgment. In light of this the High Court can, at common law, be said to have correctly dealt with the matter in light of the contentious nature of the land question in Zimbabwe.

²⁶⁰ Richard Frimpong Oppong “*Enforcing Judgments of the SADC Tribunal In The Domestic Courts of Member States*” at page 119 available at

http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010_chapter7.pdf

²⁶¹ Ibid

²⁶² Ibid

VII Plotting the Way Forward

In plotting a way forward for the Tribunal it is critical to observe the series of events which followed the *Campbell* Case in order to understand how it is that SADC finds itself at its current impasse. Like the old saying goes, you cannot know where you are going unless you know where you're from. Therefore in plotting a way forward for the Tribunal, it would be amiss not to take note as to where the root of the issues for the Tribunal began.

As set out throughout this paper, in 2008 the Tribunal ruled that the Zimbabwean government's seizure of agricultural land owned by white farmers violated the SADC Treaty principles on non-discrimination and the rule of law.²⁶³ The situation leading to the litigation had come to a head due to the land question in Zimbabwe, which had long been a smouldering political and economic problem. The problems associated to the question of land were partly due to acute racial inequities in land ownership arising from colonial conquest and white minority rule, subsequently entrenched by Zimbabwe's negotiated settlement via the Lancaster House Agreement.²⁶⁴

When the Tribunal heard the *Campbell* case, it noted that the Zimbabwean Supreme Court, the country's highest court, had recently denied the applicants the right to institute domestic proceedings objecting to the seizure of their land.²⁶⁵ The Zimbabwean Supreme Court had accepted that its jurisdiction to hear the matter had been ousted by Amendment 17, consequently, the Tribunal held that the applicants did not have domestic legal remedies available to them and were entitled to lodge their complaint with the regional court. Subsequent to the Tribunal's decision in the *Campbell* Case the Zimbabwean government rubbished the decision with President Robert Mugabe describing the decision as "an exercise in futility"²⁶⁶, and so began his government's campaign to emasculate the Tribunal and nullify its rulings.

The Tribunal's decision was viewed in Harare as an intolerable interference in the country's domestic affairs.²⁶⁷ In 2009 the Zimbabwean Minister of Justice, Patrick Chinamasa, announced that his government had withdrawn from the Tribunal's jurisdiction. He argued that the regional

²⁶³Nathan op cit note 6 at 871

²⁶⁴ Ibid at 874

²⁶⁵ Ibid at 875

²⁶⁶ Ibid at 876

²⁶⁷ Ibid

court was not legally constituted because its Protocol had not been ratified by two-thirds of the Member States, a requirement that he said was stipulated in the Protocol.²⁶⁸ This argument was still born from conception, as Chinamasa relied on an outdated version of the Protocol which had subsequently been revised in 2001 and scrapped the requirement he relied on to found his argument. On three occasions the Tribunal referred Zimbabwe's failure to obey its rulings to the Summit for appropriate action and on each occasion the Summit declined to act.²⁶⁹

It would seem that for Zimbabwe the Summit's passivity was not sufficient as the Zimbabwean government also wanted to ensure that the Tribunal's rulings were rendered void.²⁷⁰ To this end, Chinamasa successfully lobbied his ministerial counterparts sitting in the Council to support Harare's stance.²⁷¹ In 2010, after the annual Summit meeting, he announced that the heads of state had suspended the Tribunal for six months pending the outcome of a review by the region's justice ministers and attorney generals.²⁷² Following the 2010 Summit meeting, the SADC Secretariat commissioned an independent review of the Tribunal.²⁷³ The review was undertaken by Lorend Bartels from the University of Cambridge, the review affirmed the jurisdiction of the Tribunal and vindicated its decisions.²⁷⁴

Notwithstanding the review by Lorend Bartels, in 2011 the Summit resolved to continue with the moratorium placed on the Tribunal thus suspending the Tribunal's operation. Furthermore, the Summit resolved not to renew the terms of judges sitting on the Tribunal whose terms were expiring whilst also deciding not to appoint new judges to replace those out going, this would eventually bring about the effective disbandment of the Tribunal as all the judges of the Tribunal's terms expired either in 2010 or 2011. Whilst the moratorium was in effect the ministers of justice and attorney generals of the Member States continued with their review and redrafting of the Protocol, the fruits of which would spawn the New Protocol discussed in chapter 4.

²⁶⁸ Ibid

²⁶⁹ Ibid

²⁷⁰ Ibid

²⁷¹ Ibid

²⁷² Ibid at 878

²⁷³ Ibid

²⁷⁴ Ibid

Having noted the legal and political flashpoints giving rise to the impasse surrounding the Tribunal, it is clear that the biggest issue which has dogged the Tribunal is its enforcement capabilities. As previously stated, article 32 of the Protocol requires that any failure by a Member State to comply with a decision of the Tribunal is to be referred to the Tribunal, to which if the Tribunal establishes the existence of such failure, shall report its findings to the Summit for appropriate action.

The issues surrounding article 32 of the Protocol are clear when looking at Zimbabwe's failure to uphold the interim orders restraining the Zimbabwean government from removing the applicants or allowing their removal from their land. This as well as various other orders such as directing government to refrain from taking steps that would interfere with the peaceful residence on and beneficial use of the applicants' property, as well as the failure to abide by the Tribunal's decision in the *Campbell Case*.

All of the abovementioned were referred to the Tribunal in terms of Article 32(4) with the Tribunal ruling in favour of the Applicants and referring the matters to the Summit for "appropriate action" in terms of Article 32(5), to which no follow up action was taken by the Summit. Thereby rendering the work of the Tribunal in vein, the lack of enforcement capabilities of the Tribunal and the Summit's pandering to political considerations as opposed to the rule of law has not been remedied by the New Protocol. Article 44 of the New Protocol is in essence a carbon copy of its predecessor article 32, therefore clearly the problems associated with enforcement have not been remedied.

With this in mind, going forward it would be prudent for SADC to consider adopting the approach of the Court of Justice, which in terms of article 260(2) of the TFEU enable the Court of Justice to impose a financial penalty on member states which fail to comply with its judgements. However, merely bestowing the Tribunal with penal jurisdiction insofar as failure by states to comply with the Tribunal judgments doesn't fully resolve the issue of enforcement as the issue is twofold.

Certainly granting the Tribunal with the power to impose penalties would be a step in the right direction, however the final piece in the puzzle to solving this issue would be more robust action by the Summit when Member States fail to observe the judgments of the Tribunal i.e. economic

embargoes. As what good are penalties if there are no consequences for Member States who fail to adhere to them. Therefore the Summit is key and critical to the proper functioning of the Tribunal and SADC as a whole. Thus the necessary political will by the Heads of State must be found before the Tribunal shall be able to function, otherwise the institution is merely another paper tiger.

With regards to “political will”, questions can also be asked about SADC’s integration model with specific reference being with regards to the appropriateness of SADC adopting a market integration model or “customs unions” model in its approach to integration. Evidence of this can be solicited from SADC’s RISDP, which as mentioned in chapter 1 is SADC’s road map to providing strategic direction to SADC in achieving its long term goals. The RISDP indicates that SADC’s thinking with regards to achieving its aim of integration, is to follow the classic linear model of integration by way of establishing a Free Trade Area initially, moving onto a customs union and eventually establishing a monetary union with a common currency.²⁷⁵ This is very much in the same vain as the approach of the European Union as evidenced by the aims of the EC as set out in chapter 2. The aforementioned once again adding to the ever growing narrative that SADC has adopted a wholly Eurocentric approach to integration.

One of the many issues with following the Eurocentric approach to African integration is the assumptions made under the Customs Union Theory to integration. Assumptions such as that, *“trade within each country is assumed to be perfectly competitive; full employment is implied; problems of adjustment in connection with the formation of a customs union are disregarded”*.²⁷⁶ The aforementioned assumptions are problematic due to the fact that even at the time of the theories development it was not in tuned with the reality of the economies found in Europe and accordingly is even less in tune with the African context. There are numerous examples to illustrate how the above assumptions are not applicable to Africa but perhaps none more so than the fact that in South Africa, SADC’s strongest economy, unemployment is currently estimated to be at 25.4%.²⁷⁷

²⁷⁵ Regional Indicative Strategic Development Plan at 80

²⁷⁶ T Ostegaard “ *Classical Models of Regional Integration – what Relevance for Southern Africa*” in B Oden (ed), *Southern Africa After Apartheid* at 31

²⁷⁷ Statistical Release P0211, Quarterly Labour Force Survey, 10 February 2015

In light of the above, it is questionable why a linear approach has been favoured as opposed to perhaps a developmental approach as that provided for by the “Development Integration Model”²⁷⁸ a model more in tune with the issues faced in third world countries. For instance, the Developmental Integration Model favours political cooperation at a high level as a prerequisite for implementation as opposed to being the final stage of integration as envisioned by the Customs Union theory.²⁷⁹ An approach to integration premised on greater political cooperation could in turn have positive effects for the operation of the Tribunal insofar as that although individual access to the Tribunal has been abolished, a Tribunal able to set judicial precedents for domestic courts on the application of the SADC Treaty as mentioned in chapter 4, coupled with political cooperation would likely give rise to better enforcement of the SADC Treaty. As governments could seek diplomatic situations to judgments they have issue with.

Another little known issue facing SADC and the Tribunal is that of the organisations funding constraints and the leverage exacted upon SADC and its institutions by foreign donors. Although Article 33 of the Protocol and Article 45 of the New Protocol provide that the budget of the Tribunal shall be from the annual budget of SADC, the reality of this is that in 2004 SADC received approximately eighty percent of its project funding from the European Union and other foreign sources making SADC extremely vulnerable to donor leverage²⁸⁰. Academics have argued that this leverage is not hypothetical as in 2005 Western donors withdrew their support for the Regional Peacekeeping Training Centre, which was utilized as a shared SADC facility, because of Zimbabwe’s human rights abuses.²⁸¹

The threat of donor leverage whether real or perceived cannot be discounted when as recently as 2011 it was expected that seventy two percent of SADC’s total budget was expected to come from foreign funders. Furthermore there is evidence to suggest that the Tribunal was always a donor driven initiative, Tobias Lenz draws on records of the SADC Council of Ministers to show that in the late 1990s the organization’s donors had become increasingly dissatisfied with SADC’s failure to meet its objectives, thus threatening to cut their funding and were calling for

²⁷⁸ Ostegaard op cit note 276 at 33

²⁷⁹ Ibid at 34

²⁸⁰ Nathan op cit note 6 at 882

²⁸¹ Ibid

the creation of a dispute settlement mechanism that would press Member States to abide by their commitments²⁸².

The drafters of the Protocol, who included a British judge funded by the European Community, emulated the features of the Court of Justice in order to alleviate these donor concerns and enhance, in donors eyes, the credibility of SADC's court and regional integration mission.²⁸³ Accordingly, the influence of a British judge in the drafting of the Protocol explains the similarities found in the institutional structure of the Tribunal with those in the Court of Justice. As mentioned in chapter 4 the distrust of the Tribunal, real or perceived, by Member States likely stems from the interference in SADC's affairs by international donors as early as in the drafting of the Protocol.

When looking at the issue surrounding the SADC's funding and the history of the Tribunal, it is obvious that the decisions of the Tribunal were always going to be looked upon with suspicion. Therefore opening up SADC and more specifically the Tribunal to scathing political attacks from dissatisfied Member States with the Zimbabwean newspaper *The Herald* concluding that "[if] he who pays the piper calls the tune, then SADC is not in control of its affairs at all".²⁸⁴

To circumvent this form of attack which invariably delegitimises the Tribunal and SADC as a whole, SADC's budget should be funded wholly by Member States if Member States are truly serious about making the organisation work. Whilst none of the Member States have advanced funds for SADC's budget, it is hard to see the Summit forgoing years of solidarity, forged decades ago whilst each nation battled collectively against colonialism, minority rule, Apartheid and the western allies of those regimes²⁸⁵, and take action against one another for failing to abide by the Tribunals decisions.

Finally, much has been written about the loss of the Tribunals human rights jurisdiction as a result of the New Protocols diminished jurisdiction as set out in chapter 4. The question that should be asked is whether the observance of human rights should be a regional issue, the fulfilment of which should be monitored by the Member States, or whether it is an issue which

²⁸²Nathan op cit note 6 at 883

²⁸³ Ibid at 883

²⁸⁴ Ibid

²⁸⁵ Ibid at 884

should be dealt with not regionally but continentally by the African Union, more specifically the African Court of Human and Peoples Rights an institution of the African Union.

On one hand, dealing with the actions brought by natural persons at the regional level in theory alleviates the workload on the African Court of Human and Peoples rights and is likely to ensure greater access to justice as well as a more expedient process. However, in the same vain, it hardly can be argued that the court's case load is such that it requires the establishment of a lower courts *vis a vis* the General Court. Perhaps regional courts such as the Tribunal should be focused on matters pertaining to economic integration in order to streamline the process of faster regional integration.

The solution is not clear though one would imagine that it would be preferable the African Court of Human and People's Rights have a body of work that regional courts, like the Tribunal, could draw guidance from in the in the guise of the doctrine of *stare decisis* in order for there to be a uniform application of human rights decisions across the continent and regionally. Accordingly, perhaps it is or was slightly premature for the Tribunal to begin with a human rights mandate before the African Court of Human and Peoples Rights had as yet established itself on the continent as the final arbiter on matters pertaining to human rights violations.

Therefore going forward SADC Member States should consider granting the Tribunal a modicum of penal jurisdiction insofar as situations whereby Member States deliberately refuse to abide by its ruling. Secondly, serious thought should be given to abandoning the current Customs Union theory of linear progression in favour of a model more in tune with the African continents peculiar set of circumstances. The Development Integration model is suggested as possibly more suited to the challenges faced by the continent. Finally, a concrete commitment to fund the work of the organisation is critical and this all revolves around political will. The Member States need to fully buy into the organisations aims and objectives before it can be successful, short cited decision making aimed at satisfying national constituencies at the expense of the regional agenda must come to an end if SADC is ever to reach its full potential. This can be done by starting with an issue as simple as funding, Heads of State fearful of committing already constrained national budgets to SADC initiatives due to the domestic backlash they are likely to face, must put these fears aside as the long term goals of their nations invariably depend on the success of the regional body.

VIII Conclusion

When looking back at the saga which played itself out with regards to the Tribunal as well as the *Campbell* Case, the question which remains to be answered is whether or not the disbandment and subsequent resurrection of the Tribunal means the end of private individuals ability to hold states accountable at regional level. When looking through the contents of the New Protocol, it is apparent that the answer is yes, the will of the Summit in this regard is clear. The truly unfortunate aspect of this is that it is difficult to comprehend what role the resurrected Tribunal shall play regionally, as the rebooted Tribunal has effectively been reduced to a passenger in SADC's institutional machinery. Unlike the Court of Justice, a Tribunal without the power to even hold Member States accountable for their actions can aptly be described as a "paper tiger".

The question of land is an acute one which has plagued Zimbabwe for decades. From the outset of the *Campbell* Case the Applicants in their submissions acknowledged the governments legitimate aim of redressing the imbalances created during the colonial period insofar as land was concerned. The legitimacy of the aim being unquestionable. It is clear that a variety of factors and agents played a part in causing the situation to spiral into the lawlessness that was witnessed towards the turn of the millennium. Factors such as the complicit conduct of the government of the United Kingdom in relation to the Lancaster House Agreement, all too often overlooked when addressing the issues surrounding Zimbabwe. However, taking that into account, what cannot be forgotten is the unsatisfactory manner in which the land redistribution program was carried out by the government of Zimbabwe.

The truly unfortunate aspect being how a legitimate policy goal was irrevocably marred by intimidation and violence which resulted in human rights abuses and the displacement of thousands of Zimbabweans, the likes of whom were intended to be the beneficiaries of the program. The vast majority would end up victims of the program rather than beneficiaries, a cruel irony. In this regard, culpability lays at the feet of the government of Zimbabwe and perhaps indirectly at the door of the Summit due to its hands off approach as seen with its inaction during the *Campbell* Case.

Member States in the region, such as South Africa, whom have found the "willing buyer willing seller" principle problematic when attempting to execute land redistribution can learn a lot from

the events which unfolded in Zimbabwe. No lesson more critical than that land redistribution is a volatile subject with various dimensions and should not be approached hastily. An opportunity to showcase how to legitimately redress spatial inequalities was missed in Zimbabwe, one can only hope that the next nation to attempt to do so learns from the mistakes made in Zimbabwe.

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