

Fick & Others v the Republic of Zimbabwe: A national court finally enforces the judgment of the SADC Tribunal as a foreign judgment – a commentary on implications on SADC Community Law

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1. Introduction

The SADC Tribunal, notwithstanding its hibernation status as it currently goes through a legislative review, continues to somehow remain the subject of discussions in various fora including national judiciaries. This commentary is predicated upon two national courts judgments rendered in two different countries but largely emanating from the on-going ramifications of the judgment in *Mike Campbell & Ors v Government of Zimbabwe & Ors*.¹ On 29 January 2009, the High Court of Zimbabwe (herein Harare High Court) dismissed an application for the registration of the *Campbell* judgment for purposes of recognition and enforcement in the case of *Gramara (Pvt) Limited & ors v Government of Zimbabwe and Ors*.² Four years later, in the case of *Republic of Zimbabwe & Another vs Fick & Others*,³ the Constitutional Court of South Africa (herein CCSA) granted leave to appeal, but on the merits dismissed the appeal by Zimbabwe against the decision of the Supreme Court of Appeal⁴ of South Africa (herein SCASA) confirming the dismissal of an application for rescission of judgment by the Northern Gauteng High Court sitting at Pretoria.⁵ The decision Zimbabwe sought to be rescinded was an order granting the recognition and registration of the costs order rendered by the SADC Tribunal in the *Campbell* case.

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¹ SADC (T) 002/2008. Judgment available at: <http://www.sadc-tribunal.org/?cases=mike-campbell-pvt-Ltd-and-another-v-the-republic-of-zimbabwe-3> (accessed on 21 June 2014).

² HH 169/2009. Available at: <http://www.zimlil.org/zw/judgment/harare-high-court/2009/50> (accessed on 21 June 2014).

³ (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (27 June 2013).

⁴ *Government of the Republic of Zimbabwe v Fick and Others* [2012] ZASCA 122.

⁵ *Fick and Others v Government of the Republic of Zimbabwe*, Case No 77880/2009, North Gauteng High Court, Pretoria, 13 January 2010, unreported.

This treatise is a short commentary in respect of a number of aspects dealt with by the two courts while presiding over the applications or motions. The two judgments certainly have implications in the SADC region regarding the future enforcement of decisions of the SADC Tribunal once it resumes operations.⁶ The commentary is important as it deals with implications of the two judgments that go beyond the SADC Tribunal, but in respect of recognition of judgments of international tribunals in South Africa and Zimbabwe, whether or not the 'foreign' decisions sound in money.

2.1 The Facts and Initial Proceedings

Full accounts of the facts can be found in the respective judgments. Suffice to state briefly that following the rendering of the *Campbell* decision by the SADC Tribunal in 2008, non-compliance with the order resulted in further proceedings where the applicants approached the SADC Tribunal for recourse.⁷ Thereafter, the SADC Tribunal referred Zimbabwe's non-compliance to the SADC Summit for 'appropriate action' in terms of Article 32 of the SADC Treaty/Protocol on the SADC Tribunal and Rules of Procedure Thereof (herein Protocol on the SADC Tribunal).⁸

In the *Gramara* case, two of the applicants in the *Campbell* judgment approached the Zimbabwe High Court in Harare seeking to register a non-monetary order for recognition for purposes of enforcement of the *Campbell* order to the extent that that order in part sanctioned Zimbabwe not to expropriate these applicants' farms. The application was based both on legislation, namely, the Civil Matters (Mutual Assistance) Act,⁹ as well as applicable common law principles. The application was dismissed on grounds and reasons to be discussed below.

On their part, the South African proceedings were initiated in 2009 in the Pretoria High Court, where some of the applicants in the *Campbell* decision sought to enforce the costs order.

⁶ Although the new-looking SADC tribunal must be divested with human rights competence per se, the author is reliably informed that the manner of execution of its judgments is not a contested issue hence the relevance of this commentary even after the on-going legislative review process.

⁷ *Louis Karel Fick & Others v Zimbabwe* Case No. SADC T 01/2010. Judgment available <http://www.sadc-tribunal.org/?cases=louis-karel-fick-others-v-the-republic-of-zimbabwe> (accessed 21 June 2014).

⁸ It is common cause that the refusal by Zimbabwe to comply with the SADC Tribunal decision was premised on the official position the SADC Protocol had not been ratified by Zimbabwe and not come into force in respect of Zimbabwe. For instance 'SADC Tribunal not a court' *New Zimbabwe* 22 September 2009 available at: <http://www.newzimbabwe.com/news-1023Tribunal%20a%20bush%20court%20Chinamasa/news.aspx> (accessed on 14 May 2014)

⁹ [Chapter 8:02].

Zimbabwe boycotted those proceedings relying primarily on the perceived immunity of sovereign states from lawsuits instituted in national courts.¹⁰ However, once the Pretoria High Court registered the costs order and the applicants sought to execute Zimbabwe's immovable property situated in South Africa, Zimbabwe interrupted its boycott by seeking the rescission of that judgment. The application for rescission of judgment was dismissed by the Pretoria High Court, Zimbabwe appealed to the SCASA. The appeal was dismissed.¹¹ Then Zimbabwe appealed against the refusal to rescind the judgment. The appeal was filed in the CCSA. Leave to appeal was granted as the matter was deemed to raise constitutional issues and interests of justice required it.¹²

2.2 The Issues and Legal Bases

The Harare High Court phrased its issues as follows:

The first is whether the SADC Tribunal was endowed with the requisite jurisdictional competence in the case before it. The second is whether the recognition and enforcement of the Tribunal's decision in that case would be contrary to public policy in Zimbabwe.¹³

On its part, the CCSA's main issue coupled with several sub issues was 'whether South African courts have the jurisdiction to register and thus facilitate the enforcement of the costs order made by the Tribunal against Zimbabwe'.¹⁴

Although issues were phrased and approached differently in the two proceedings, the contentions boiled down to the question of whether or not the judgment of the SADC Tribunal could be regarded as a foreign judgment for purposes of registration (recognition) and enforcement. As earlier stated, the aspect of the *Campbell* decision in the Zimbabwe proceedings was not monetary (interdict) while the costs order of the same decision in the

¹⁰ This strain of sovereign immunity of states from lawsuits instituted in national courts is well established in the domain of public international law. The origin of this doctrine was based on absolute immunity, where in no circumstances a foreign state would be subject to jurisdiction of national courts for any acts. However, as a result of the ever-transforming place of states in society,

¹¹ *Government of the Republic of Zimbabwe v Fick and Others* [2012] ZASCA 122.

¹² The dissenting judgment of Justice Jafta argued that it was not in the interests of justice to grant leave to appeal. Also the prospects of success were not addressed in the application for leave to appeal hence the application was, in the opinion of the judge, fatally defective.

¹³ *Gramara* Judgment, page 8.

¹⁴ *Fick* Judgment, para 23.

South African proceedings was purely monetary (order for costs). Central to the determination in both cases was whether national courts are required to recognise judgments of the SADC Tribunal as 'foreign' judgments.

In both proceedings, reliance was placed, correctly so, on the provisions of Article 32(5) of the Protocol on the SADC Tribunal, which provides that SADC Tribunal decisions are enforced by adopting the procedure used to enforce foreign judgments in SADC member states.¹⁵ Both countries have a clear procedure as they share the same common law traditions in the Roman-Dutch law. Over and above applicable common law principles, South Africa enacted the Enforcement of Foreign Civil Judgments Act,¹⁶ which serves to regulate the registration of foreign judgments by prescribing the salient factors a local court must take into account when presiding over a request for registration. In both proceedings, common law principles and legislation were relied on by the applicants. In other words, the legal bases conferred upon the respective applicants the standing to seek the registration of a part of the *Campbell* decision as well as vesting the national courts with competence to preside over such motions.

The only remarkable difference in these proceedings was the fact that in Zimbabwe, the international judgment was sought to be registered in the territory of and against the State which lost the lawsuit at the international level. In contrast, in South Africa, the international judgment was sought to be registered against a foreign sovereign state in the territory of another state. While the legal and political implications of the first scenario were unusual, the added twist in the South Africa scenario had a bearing on diplomatic relations between the two SADC member states.

In fact this was not the first time a South African court made a ruling with political implications on Zimbabwean territory. In 2013, a South African High Court ruled that failure and or delay by South African criminal investigation institutions, including the National Prosecuting Authority of South Africa, regarding war crimes and crimes against humanity perpetrated by Zimbabwe state security agents on members of the opposing political parties violated South Africa's

¹⁵ Article 32(1) provides that;

'The law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State in which the judgment is to be enforced shall govern enforcement'.

¹⁶ Act No. 32 of 1988.

international law obligations including those arising from the Rome Statute.¹⁷ As expected, this ruling did not go well with Zimbabwean authorities who made enraged public utterances as Zimbabwean army generals faced arrest upon entering South African territory.¹⁸

2.3 Consensus on the Binding Nature of the SADC Tribunal Decisions

In both proceedings, the courts set the scene by first dealing with the issue as to whether or not the Protocol had come into force under SADC Community Law well before delving into salient factors that regulate motions for the registration of a foreign judgment for purposes of recognition and enforcement. This was inevitable as the pedigree of a foreign judgment invariably depends on the status of the court that rendered it. As will be discussed below, once a foreign court has legitimacy issues, this avails all manner of arsenal to the defendant in opposing the registration of such a judgment. With relative ease, both national courts held that the SADC Tribunal Protocol had already come into force in 2001 contrary to Zimbabwe's persistent claims that it did not. The legal reasoning upon which this conclusion is based is very critical as it will dispel any future attempts to undermine the work of the Tribunal based on patently frivolous attacks on its legitimacy.

At the core of the dispute regarding the legitimacy of the SADC Tribunal was the allegation by Zimbabwe in both proceedings that the SADC Tribunal Protocol never came into force as it failed to amass the required two-thirds ratifications in terms of Article 38 of that Protocol. Both courts arrived at the same conclusion, albeit correct, that once Article 16(2) of the SADC Treaty was amended by Summit by way of the Agreement Amending the Treaty of the Southern Africa Development Community (herein Amending Agreement), the 'Protocol of the Tribunal constituted an integral part of the Treaty and became binding on all Member States without the need for its further ratification by them'.¹⁹ The amendment rendered the dictates of Article 38 redundant.

¹⁷ Statute of the International Criminal Court, Document No. A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. Available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed on 21 June 2014).

¹⁸ SA-ZIM at war over generals 29 November 2013 Newsday available at: <https://www.newsday.co.zw/2013/11/29/sa-zim-war-generals/> (accessed 15 May 2014).

¹⁹ *Gramara* Judgment, page 12.

The Amendment Agreement would only take effect upon adoption by two-thirds majority, which milestone according to Justice Patel,²⁰ was attained when '13 out of the 14 Heads of State or Government of the Member States, including Zimbabwe' ratified the Amendment.²¹ With a little variation in statistics, the CCSA held that the two-thirds majority was achieved when the Amendment 'was signed by 14 Heads of State or Government including Zimbabwe and South Africa'.²²

As a matter of fact 13 member states signed the Amendment Agreement in Malawi in 2001 thereby causing it to enter into force binding even those other states that did not sign the Amendment on account of the two-thirds majority requirement.²³ Angola is the only member state that did not append its signature on the day of its adoption probably as a result of non-attendance rather than dissent.

This finding by both courts laid to rest any potential protestations to the legitimacy of the SADC Tribunal. The pronouncement also rendered irrelevant all sorts of arguments mobilised to contest Zimbabwe's insistence that she is not bound by the SADC Tribunal Protocol. Such arguments included the 'acquiescence theory' to the effect that notwithstanding Zimbabwe's refusal to recognise the SADC Tribunal, by seconding a national judge to sit in that Tribunal, Zimbabwe had confirmed its recognition of the Tribunal, hence she is estopped from reneging from that state of affairs. Therefore, the finding that Zimbabwe is bound by the SADC tribunal Protocol following the amendment to the SADC Treaty, read together with the provisions of the Article 32(1) of the Protocol, boils down to confirming the binding nature of Tribunal decisions against SADC member states.

2.4 Legal Principles Relevant to the Registration of Foreign Judgments for Purposes of Recognition and Enforcement

It followed without saying that both courts had to deal with factors in domestic law that tend to confront foreign judgments whenever a motion for registration of same has been filed with the

²⁰ Justice Bharat Patel is a former Attorney-General of Zimbabwe who took office between May and December 2008 following the removal of Sobusa Gula-Ndebele in December 2007.

²¹ *Gramara* Judgment, page 12.

²² *Fick* Judgment, paragraph 11.

²³ See the signed copy available at: <http://sadc-tribunal.org/wpcontent/uploads/2013/03/AgreementAmendingTreaty.pdf> (accessed 15 May 2014).

relevant court. As already stated, these factors are located both in legislation and common law. Zimbabwe and South Africa share the same common law – Roman – Dutch law, although the respective legislation dealing with registration of foreign judgments is not necessarily identical.

In summary, these factors are that the foreign judgment must be final and sound in money, it must have been rendered by a foreign court with jurisdiction or competence to render same. The defendant against whom enforcement is being sought ought to have been given an opportunity to defend same, the judgment ought not to have been obtained through fraud, the judgment must not seek to enforce a penal law, and lastly, registration must not be against public policy that prevails in the territory where the registering court is situate.

It is important to note that the Harare High Court, though it made passing remarks on other factors, restricted itself to two issues (factors), namely, the jurisdictional competence of the SADC Tribunal and the public policy factor. On its part the CCSA dealt with all the factors as will be discussed below.

2.4.1 SADC Tribunal as a ‘foreign court’

When dealing with this aspect, both the Harare High Court and CCSA had no difficulty in interpreting the provisions of Article 32(1) of the Protocol. They both came to the conclusion that Zimbabwe and South Africa are parties to the Protocol, which, in terms of this provision, enjoins SADC member states to facilitate the enforcement of the Tribunal’s decisions by adopting the foreign judgments (recognition and enforcement) procedure. Effectively, the provision installed the Tribunal as a ‘foreign court’ for purposes of enforcing its decisions in SADC member states.

On this aspect, the Harare High Court sought to rely on the Civil Matters (Mutual Assistance) Act.²⁴ This piece of legislation is unique in the SADC region in that it designates international judicial and quasi-judicial institutions established under the United Nations and other political gatherings as ‘foreign courts’. The designation of international courts as foreign courts is very important in that such a legislative move would see decisions of other courts such as the African Court on Human and Peoples’ Rights (herein African Court) being enforced by way of the same procedure notwithstanding the absence under the African Court legal framework, of a provision

²⁴ [Chapter 8:02].

similar to Article 32(1) of the Protocol. This development would assist in expanding options for the enforcement of international human rights decisions/judgments.

However, the SADC Tribunal was not designated in that Act, and accordingly its decisions could not benefit from this statute for purposes of recognition. It is pleasing to note that the Harare High Court did not end there, but turned to common law after concluding that the statute does not preclude reliance on the common law where the statute has been found wanting.

The CCSA also relied on local legislation that regulates registration of foreign judgments, namely, the Enforcement Act. Coincidentally the SADC Tribunal was not designated as a foreign court in terms of Section 3(2) of that Act. The Court also declined the application of the Enforcement Act to the matter on account of the fact that the Act applied to the Magistrates' Court only. Just like the Harare High Court, the CCSA resorted to common law principles.

It is important to comment on the recurring issue of designation of foreign courts as a requirement of the recognition of foreign judgments. The attitude of the courts in both proceedings lead to the inevitable conclusion that SADC member states that perpetuate the 'designation approach' must ensure that their respective laws have been amended in order to specifically designate the SADC Tribunal as an international court. This is not window dressing. The designation of the SADC Tribunal (and other international courts and quasi-judicial organs) would guarantee compliance of states with Article 32(1) of the Protocol.

2.4.2 Jurisdiction of the SADC tribunal to render the foreign judgment

Zimbabwe's objection to the jurisdiction of the SADC Tribunal rests at the core of both proceedings. In fact this attitude goes back to the proceedings before the SADC Tribunal itself. However, as will be discussed below, the issue of jurisdiction took a number of dimensions. On one hand was the contention that the SADC Tribunal had no jurisdiction over Zimbabwe (jurisdiction *personae*) on account of the flawed argument that the Protocol had not come into force in general and in respect of Zimbabwe in particular. On the other hand, Zimbabwe contested the Tribunal's competence to preside over human rights-related disputes (jurisdiction *materiae*).

The common law regulating enforcement of foreign judgments requires that the foreign court have jurisdiction.²⁵ Zimbabwe, before the Harare High Court only raised the objection that the Tribunal had no jurisdiction over Zimbabwe on allegations that the Protocol never came into force. This objection has already been commented on in this piece. Suffice to state that the Harare High Court goes at length explaining how treaties enter into force in terms of the provisions of the Vienna Convention on the Law of Treaties, and specifically how the Protocol came into force following the amendment to the SADC Treaty. The climax of the reasoning was the Court's scoff at Minister Chinamasa's spirited public denouncing of the SADC Tribunal. The Court held that those '... official pronouncements repudiating the Tribunal's jurisdiction, is essentially erroneous and misconceived'.²⁶

Interestingly, the Harare High Court was very keen to deal with the jurisdiction *materiae* of the SADC Tribunal had it not been that the Respondents had not placed that argument before the Court. Nevertheless, the Court had to express its opinion on the omitted point but declined to make a ruling thereon. In a nutshell, the Harare High Court was so inclined to reject the existence of the competence. The Court held that;

*Despite this broad formulation, I am not entirely persuaded that the general stricture enunciated in Article 4(c) of the Treaty, which requires SADC and the Member States to act in accordance with the principles, inter alia, of "human rights, democracy and the rule of law", suffices to invest the Tribunal with the requisite capacity to entertain and adjudicate alleged violations of human rights which might be committed by Member States against their own nationals.*²⁷

In the CCSA, Zimbabwe raised the same objection to registration of the *Campbell* decision, namely, that the Protocol did not come into force hence not binding on Zimbabwe. The Court took notice of the fact that, in the *Campbell* proceedings, Zimbabwe never challenged the competence of the Tribunal over Zimbabwe on the basis of the alleged non-ratification of the

²⁵ *Jones v Krok* 1995 (1) SA 677 (A); *Purser v Sales*; *Purser and Another v Sales and Another* [2000] ZASCA 46; 2001 (3) SA 445 (SCA) ; North and Fawcett: *Cheshire and North's Private International Law* (13th ed. 2004); Forsyth: *Private International Law* (4th ed. 2003);

²⁶ *Gramara* Judgment paras 12 – 13.

²⁷ *Gramara* Judgment para 44.

Protocol.²⁸ This was taken by the Court as tantamount to submitting to the jurisdiction of the Tribunal.²⁹ As to the validity of Zimbabwe's objection, the Court held that;

The basis for objecting to the jurisdiction of a foreign court or tribunal whose order is sought to be enforced in a South African court must, in my view, be materially similar to the objections previously raised before the foreign court or tribunal that made the order to be enforced. Otherwise the objection should be dismissed.

In essence, by only focussing on jurisdiction *materiae* before the SADC Tribunal, Zimbabwe had acknowledged the competence of the Tribunal per se with objections only targeted to the perceived lack of jurisdiction to preside over human rights-related disputes on account of absence of specific human rights or treaties or protocols in SADC community upon which to form the legal basis.³⁰

In line with the Harare High Court approach, the CCSA had occasion to comment on the jurisdiction *materiae* although not brought before it by the parties. It concluded without hesitation that 'The Tribunal had jurisdiction over all disputes relating to the interpretation and application of the Treaty and over disputes between Member States and natural or legal persons'.³¹ The CCSA went on to hold that even assuming the SADC Tribunal had no human rights-related competence as follows;

'... having otherwise recognised and accepted the Tribunal's jurisdiction but for the alleged absence of standards on human rights or agrarian reform, Zimbabwe did, according to our law, submit to the Tribunal's jurisdiction. Broadly speaking, this meets the first common law jurisdictional requirement.'

The above pronouncement settled the issue regarding the jurisdiction of the SADC Tribunal as both Courts confirmed the legal force of the SADC Tribunal over all member states including Zimbabwe. It is pointless here to comment much about the difference in the Court's finding as to whether or not the SADC Tribunal has a human rights-related jurisdiction as this competence is subject to legislative review which is currently underway.

²⁸ *Fick* Judgment paras 40 – 50, generally.

²⁹ *Fick* Judgment, para 49.

³⁰ *Fick* Judgment paras 44 – 46.

³¹ *Fick* Judgment, para 48.

2.4.3 Finality of the judgment, sounding in money

Whether or not any of the two Courts had to deal with these two issues was determined by the manner in which issues were couched. The monetary character of the judgment is an issue never brought to the attention of the Harare High Court. Nonetheless, the matter presenting itself as highly novel, the Court had to make remarks on this aspect. The Court conceded that principles regulating enforcement of foreign judgments ‘... do not address judgments and rulings with broader proprietary implications and administrative consequences as is the case with the SADC Tribunal decision....’.³² However, for the sake of ‘international comity in a globalised world’ including the recognised competence of the Tribunal in question, there was no basis to deny registration solely on account of the non-monetary nature of the SADC Tribunal.³³

The Harare High Court did not deal with the aspect of the finality of the *Campbell* judgment perhaps as it could go without saying that the decision was final there being no other court or tribunal in SADC community law or anywhere else in which competence to review decisions of the Tribunal resides.

On its part the CCSA literally ran over these requirements to fulfil the ritual as it were. Perhaps this was a result of the fact that they were issues not contested by the parties. The Court simply held thus;

*It is not in dispute that the costs order is final and that it was not obtained fraudulently, it does not involve the enforcement of the revenue law of Zimbabwe and its enforcement is not precluded by the Protection of Businesses Act.*³⁴

2.4.4 Public policy

Incredibly, the CCSA again dismissed this aspect offhand. It simply held that ‘The enforcement of the costs order is also not against public policy, of which our Constitution is an embodiment’.³⁵ In other words public policy is rooted and reflected by the constitutional principles and precepts such as the promotion of democracy, rule of law and human rights embodied in that constitution.

³² *Gramara* Judgment, page 8.

³³ *Gramara* Judgment, page 8.

³⁴ *Fick* Judgment, para 39.

³⁵ *Fick* Judgment, paras 39 – 40.

Public policy was the last factor to be considered by the High Court in the judgment. It was readily acknowledged in that decision that public policy 'is a matter that eludes precise definition'.³⁶ It is believed public policy progressively varies with time and place as social morals, with morals more or less embedded in the public policy of particular societies. Although the High Court did not refer to any prevailing judicial precedent to the effect, jurisprudence and scholarship exist bolstering the view that public policy is an elusive concept. Accordingly, in *Re Beard* it was held that public policy is seemingly a 'variable thing' that fluctuates 'with the circumstances of the time'.³⁷ Furthermore, still unsure of the parameters of public policy, in *Re Jacob Morris (deceased)*, the court held that³⁸

The phrase public policy appears to mean the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare; so that anything is treated as against public policy if it is generally regarded as injurious to the public interest...

In that case, the court arrived at the conclusion that 'public policy is determined by the circumstances of a given society at a particular historic juncture of the development of that society'.³⁹ Closer to the home of the judgment, Zimbabwe, the jurisprudence is quite clear on the proper course a court should take when dealing with public policy issues. It is unclear whether the High Court conveniently ignored such loud precedent. For the reason that public policy is always a moving target in any given time and geographical location, much caution is required of judges in the exercise of their discretion. As an 'unruly horse', public policy can take a judge to a destination never contemplated by them or any other persons.⁴⁰

³⁶ *Gramara* Judgment, page 13.

³⁷ *Re Beard* [1908] 1 Ch. 383, at 342.

³⁸ *Re Jacob Morris* [1943] N.S.W.S.R. 352.

³⁹ As above.

⁴⁰ This famous phrase came out of the mouth of Judge Burrough in the *Richardson* case where he held that 'Public policy ... is an unruly horse and when you get astride of it, you never know where it will carry you'.

In *Olsen v Standaloff*, Fieldsend CJ (as then he was) of the Supreme Court of Zimbabwe quoted with approval the famed words of Lord Atkin in *Fender v St John-Mildmay* when he immortalised the following words⁴¹

Public policy.... should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inference of a few judicial minds.

Dealing with a case involving interpretation of public policy to avoid the enforcement of a foreign arbitral award, the US Court of Appeals for the 2nd Circuit held that:

...the convention's public defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice.⁴²

Furthermore, a Swiss Court, dealing with the enforcement of a foreign award in terms of an international treaty was of the view that caution ought to be exercised when applying the 'public defence', an equivalent of public policy in that jurisdiction, had that for this defence to succeed:

There must be a violation on fundamental principles of the Swiss legal order, hurting intolerably the feeling of justice ... This exception of public order should not be twisted in order to avoid application of international Conventions which are signed by Switzerland and which form part of Swiss Law.⁴³

Now, having set out the general approach to the application of public policy during judicial reasoning as preferred by courts in a number of legal traditions, it is high time the High Court of Zimbabwe's approach to public policy in the *Gramara* judgment be analysed.

⁴¹ *Fender v St John-Mildmay* [1938] A.C. 1, at 12. See also *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* 1894 AC 535 at 553) where the Court held that 'there is high authority for the view that in matters of public policy the courts should adopt a broader approach than they usually do to the use of precedents'.

⁴² *Parsons & Whittemore v RAKTA* 508 F 2d 969 (2d Cir 1974).

⁴³ *Leopold Lazarus Ltd (UK) v Chrome Resources SA (Switz.)*, reported in (1979) 4 Yearbook of Commercial Arbitration 311, the *Cour de Justice*, Canton of Geneva

To begin with, one stands to be impressed by the approach taken by the High Court in its acknowledgment of the international dimension of public policy. In other words, with prevalent and evident international judicial and economic cohesion gravitating beyond national boundaries, that mere development of society introduces factors of an international nature, which in turn are crucial in determining public policy. Relying on Australian jurisprudence, the High Court correctly observed that the principle of legitimate expectation vis-à-vis Zimbabwe's international obligation to comply with international law and the recognition and enforcement of SADC Tribunal decisions, is a matter of public policy from a Zimbabwean perspective.⁴⁴ Consequently, it was concluded the idea that Zimbabwe should comply with judgments of the SADC Tribunal in general 'would not be contrary to the public policy of Zimbabwe.'⁴⁵ One would have expected the High Court to conclude the matter by declaring the *Campbell* judgment registered in Zimbabwe. However, the High Court went to the depth of the analysis of public policy.

Basing its reasoning on public policy, the High Court rejected the registration of the foreign judgment by citing a number of inter-connected issues such as the existence of constitutional provisions which allow acquisition of the applicants' land in the first place.⁴⁶ This was followed by the subsequent enactment of a specific legislation to that effect – the Land Acquisition Act.⁴⁷

Second, there exists domestic jurisprudence in the nature of the Supreme Court of Zimbabwe judgment in *Mike Campbell (Pvt) Ltd & Another v Minister of Security Responsible for Land, Land reform and resettlement & Another*.⁴⁸ That case confirmed the constitutionality of the land reform programme from the perspective of national law. The High Court ruled that in view of that

⁴⁴ Reference was made to the case of *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR273 [(1995) 128 ALR 353]. In that case it was held that notwithstanding lack of domestication, the mere ratification of the Convention on the Rights of the Child by Australia created an enforceable legitimate expectation [for whom?]that the state will act in accordance therewith.

⁴⁵ *Gramara* Judgment, page 15.

⁴⁶ Section 16B of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005. It authorised the state to acquire land for public use with a promise for payment of compensation only in respect of improvements on the land, but not for the land itself.

⁴⁷ [Chapter 20:10].

⁴⁸ *Mike Campbell (Pvt) Ltd & Another v Minister of Security Responsible for Land, Land reform and Resettlement & another* SC 49/07.

ordination, it would be affront to public policy should the SADC Tribunal decision be registered as it has the effect of impugning the 'legality of the programme sanctioned by the Supreme Court'.⁴⁹

Third, the nature of performance envisaged by the *Campbell* judgment, namely, payment of fair compensation and protection of quiet possession of the applicants' land is contrary to national legislation in the Constitution and parliamentary statutes hence bolstering the rejection for registration of the foreign judgment. Arriving at a contrary conclusion would, according to the Court, be 'to require its government to act in a manner that is manifestly incompatible with what is constitutionally ordained'.⁵⁰ It is clear that at this juncture, the High Court was gunning towards its conclusion in favour of the state as it employed a positivist approach to interpretation and application of the law. Needless to state that the High Court emphatically contradicted its earlier findings that states that have subscribed to international treaty obligations cannot rely on national law to avert the same.⁵¹

Fourth, registering the decision would have the effect of causing the government of Zimbabwe to reverse all acquisitions of land that were carried out since 2000. The undesirability of that approach, argued the High Court, lies in the fact that the 'political enormity' of the process 'would entail evictions' and relocations of beneficiaries of the programme. According to the High Court, 'basic utilitarian precept would dictate that the greater good must prevail'.⁵² The prevailing view was that, by comparison, there are more Zimbabweans clamouring for the agrarian reform than there are who are opposed to it. Indeed it is incontestable that enormous work would have ensued had the judgment been registered.

However, 'greater good' in my view would have been one that recognised the fact that victims of violations of rights need to be afforded an effective redress.⁵³ The evictions and relocations were only going to take place on the few farms that belonged to the three applicants whose land had already been acquired. The Court created an impression that pursuant to the *Campbell*

⁴⁹ *Gramara* Judgment, page 16.

⁵⁰ *Gramara* Judgment, page 17.

⁵¹ See paragraph 3.1 of this contribution.

⁵² *Gramara* Judgment, page 18.

⁵³ See article 2 of the Covenant on Economic, Social and Cultural Rights, adopted in 1969.

judgment, everyone whose land had been acquired was going to have their land restored. It is trite law that court orders are usually binding only on the parties to the litigation in question. Taking into account that about 87 applicants in the *Campbell* case were yet to lose their land at the time of judgment, it is therefore clear that compliance with the order for undisturbed possession would not have resulted in any evictions and relocations. This argument seemed to be the most convenient to the High Court.

3. 1 SADC Member States Legal Systems Vs Article 32 (1) of the Protocol

The purpose of this part is to gauge the extent to which legal systems of SADC member states are prepared to give effect to the provisions of Article 32 of the Protocol. The question is whether SADC member states, upon ratifying the Amendment Agreement that ushered the Protocol into legal force, made deliberate legal reform efforts to prepare their legal fraternities to receive judgments of the SADC Tribunal. In other words, to what extent are fellow SADC states' judiciaries willing to engage judicial activism at least to accept decisions of the Tribunal into their domestic spheres. The CCSA had an occasion to deal with this prospective challenge.

3.1.1 The inadequacies of national legislation

As already discussed above, both courts had no hesitation in finding that the legislation of their respective countries was inapplicable in resolving the issues before them. The reason behind the inapplicability was the patent inadequacies in that law, which could not identify the SADC Tribunal as a foreign court and its decisions as foreign judgments at the national level. Accordingly, recourse was made to common law as the ready alternative. However, as it turned out, common law had its frailties as it also could not recognise the Tribunal and its judgments for purposes of enforcement. What matter is how each of the two national courts dealt with these inadequacies of both legislation and communal law.

On its part, the Harare High Court went as far as taking a brave judicial activist approach to the recognition of the SADC Tribunal as a foreign court and its decisions as foreign judgments notwithstanding that the order being sought to be enforced did not sound in money.⁵⁴ This approach deserves deliberate applaud. The Harare High Court could have simply dismissed the motion on the grounds that Article 32 of the Protocol has no binding force at the national level in

⁵⁴ *Gramara* Judgment, page 8.

the absence of domestication in accordance with the then Section 111B of the 1980 Constitution of Zimbabwe.⁵⁵ Undesirable as it might have been, a national court dealing with international law in a dualist legal tradition could be justified in arriving at that conclusion.

The CCSA took matters further. It resolved that the common law needs to be developed in view of its patent deficiencies when confronted by the Tribunal and its decisions. In its own words, the CCSA held that the motivation behind developing the common law is that⁵⁶

It appears to me that that development was driven by the need to ensure that lawful judgments are not to be evaded with impunity by any State or person in the global village.

According to the Court, nipping in the bud impunity associated with non-compliance with court decisions is supported by the demands of 'international trade and commerce' as well as the need to ensure that legal accountability is not escaped by exploiting jurisdictional loopholes.⁵⁷ Further, it was stated that SADC member states are required by Article 32 to take all measures necessary for the enforcement of the decisions of the Tribunal. In compliance therewith, the CCSA held that since Article 32 is binding on South Africa, the Court must not shy away from frustrating the machinations of any member state to 'undermine and subvert the authority of the Tribunal and its decisions...'⁵⁸ Furthermore, the 'constitutional obligations to honour our international agreements and give practical expression to them' is another impetus to developing common law.

Furtherstill, the CCSA reasoned that enforcement of judgments lies at the heart of the principles of rule of law and access to courts. So is the right to an effective remedy.⁵⁹ Enforcement of court decisions lies at the core of right to a fair trial. In fact this finding has resonance with the findings of the Inter-American Court of Human Rights in the famed case of *Buena Ricardo et al v*

⁵⁵ Section 111B of the 1980 Constitution of Zimbabwe (as amended 19 times) provided that ratified international treaties will only have the force of law in Zimbabwe following approval by Parliament by way of a legislative act. This position is retained in the 2013 Constitution in Section 327(2) (a). However, without precedence in Zimbabwean constitutional history, Section 34 provides that 'The State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law'.

⁵⁶ *Fick* Judgment, para 54.

⁵⁷ *Fick* Judgment, para 55.

⁵⁸ *Fick* Judgment, para 59.

⁵⁹ As above.

Panama.⁶⁰ In that case, Panama was objecting to the active involvement of that Court in monitoring compliance by Panama with one of its judgments against that Organisation of American member state. As to execution of judgments, the Court held that;

*The effectiveness of judgments depends on their execution. The process should lead to the materialization of the protection of the right recognized in the judicial ruling, by the proper application of this ruling. Compliance with judgment is strongly related to the right to access to justice, which is embodied in Articles 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention.*⁶¹

On this premise, the CCSA took the need to develop common law as constituting 'execution-facilitating measures' to 'ensure execution of decisions of the Tribunal' as required by Article 32(2) of the Protocol.⁶² In conclusion, the CCSA held that 'the concept of a "foreign court" will henceforth include the Tribunal'.⁶³

The implications of this conclusion are profound in that, first, notwithstanding the preferred competence of the 'new SADC Tribunal' following the legislative review, a clear path has been charted for the execution of its decisions in South Africa. It will be inconsequential whether or not the Tribunal retains its human rights-related competence, which is highly unlikely as some SADC member states seem to be scared of adhering to rule of law, democracy and human rights issues.

Second, SADC Tribunal decisions against any other SADC member state stand good for execution in South Africa notwithstanding non-recognition of the same decisions in the affected state's legal system. In other words, to the extent that the state in question has basis for founding jurisdiction in South Africa, the state could be sued successfully in South Africa. This puts assets of fellow SADC states in danger of being sold in execution of judgment.

⁶⁰ *Baena-Ricardo et al. v. Panama*. Judgment of February 2, 2001. (Merits, Reparations and Costs)

⁶¹ As above, paras 73 & 74.

⁶² *Fick* Judgment, para 59.

⁶³ *Fick* Judgment, para 70.

Third, this finding puts to shame the political spinoff of the SADC Tribunal saga. While it cannot be established with certainty which states supported the suspension of the Tribunal during the SADC Summit in Maputo in August 2012,⁶⁴ South Africa holds a collective responsibility for that decision at a political level. Contrary to the scenario, its national courts have taken a dramatic approach to the issue by recognizing the SADC Tribunal and the binding force of its decisions before going on to hold a fellow SADC member state, Zimbabwe, accountable to its commitments under SADC community law.

Fourth, in a way, Zimbabwe has also developed its common law to enable domestic execution of decision of the SADC Tribunal although this legal position remains to be confirmed by the Constitutional Court of Zimbabwe (herein CCZ). Nonetheless, until such a time that the CCZ is seized with that legal issue, the Harare High Court finding is law.

4. Conclusion

The above comment has summarized judgments of two national courts dealing with a similar international judgment in their respective legal spheres. A number of conclusions deserve re-iteration for emphasis. First, the Protocol on the SADC Tribunal came into force following the amendment of the SADC Treaty in 2001. Second, as a consequence, the Protocol is not only binding on Zimbabwe and South Africa, but all SADC member states.

Third, Article 32 of the Protocol binds all SADC member states to guarantee execution of decision of the Tribunal, and such execution requires member states to dig deep in guaranteeing execution on account of the dictates of rule of law, democracy and human rights that lie at the heart of the SADC community law.

Fifth, the development of common law by the two courts must be an approach that quickly resonates in other legal systems of SADC member states. It is commendable judicial activism. Sixth, execution of international judgments issued by a competent court must not be subverted by exploiting fluid concepts such as public policy. The public stands to benefit a great deal from

⁶⁴ This was the Summit session that took the decision to suspend the operation of the SADC Tribunal pending the legislative review that is still underway with no definite dates regarding its completion.

international cohesion as opposed to political isolation for the benefit of the political administration in charge at any given time.