Revisiting locus standi and the grounds for jurisdiction of the SADC Tribunal in *United Republic of Tanzania v Cimexpan (Mauritius) Ltd, Cimexpan (Zanzibar) Ltd & Ajaye Jogoo*, SADC (T) 01/2009

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In a unanimous judgment of the Tribunal delivered on 6 June 2010 with Justice Pillay presiding and delivered by Justice Luis Mondlane, the Tribunal affirmed rules governing the jurisdiction of the Tribunal and locus standi of applicants before the Tribunal. The ruling dealt with three preliminary objections brought by the Republic of Tanzania to the main case that had been instituted by the respondents to have a deportation order made against the third respondent rescinded.

Briefly, the main application arose from a memorandum of understanding which the Government of Mauritius had entered into with the Government of Zanzibar. The third respondent, who is the Director of Cimexpan (Mauritius) Ltd (the first respondent), started investment operations in Zanzibar by signing a concession contract with the Government of Zanzibar through a joint venture, thus establishing a new company named *Cimexpan (Zanzibar) Ltd* (the second respondent). In a letter dated 21 September 2003, the Government of Zanzibar informed the first respondent that the contract had been terminated. Subsequently, the applicant deported the third respondent.

Once a preliminary objection is raised, the substance of the case may only be considered after the Tribunal has examined the application pertaining to the preliminary objection. The applicant contended that the Tribunal had no jurisdiction over the matter since the respondents had not exhausted local remedies and had no standing to institute proceedings before the Tribunal. The applicant further objected that the application did not disclose international delinquency so as to render the applicant liable under international law. The third objection was that the Tribunal could not grant the order sought because the application in the main case did not accord with Articles 14 and 15 of the Protocol on Tribunal.

The Tribunal, starting with the third objection and upon evaluation of Articles 14 and 15, concluded that it indeed had jurisdiction in this case because the application was between legal persons and a natural person, on the one hand, and a SADC member state, on the other.

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Most states are quick to challenge the jurisdiction of the SADC Tribunal whenever matters are brought before it, but it is important to note that the jurisdictional extents and limits of the Tribunal are clearly set out in the Tribunal Protocol. The Protocol gives the Tribunal complete judicial independence. Moreover, the move away from political control of the Tribunal is solidified by Articles 15 and 18 in the Protocol, allowing natural and legal persons to bring cases to the Tribunal. Thus, a person can bring a case against another person under Community law directly to the Tribunal if the other party so agrees. Persons may also sue the Community over the legality, interpretation or application of Community law. In addition, a person may bring a member state to the Tribunal in connection with Community law or the state's obligations under such law once national remedies have been exhausted, thus making the Tribunal a final court of appeal for matters relating to Community law.

On the first preliminary objection, namely that the Tribunal had no jurisdiction because the respondents had not exhausted local remedies and had no standing to institute proceedings, the Tribunal acknowledged that the principle of exhaustion of local remedies was not unique to the Protocol, but was a common feature of regional and international conventions. According to the principle, individuals are required to exhaust local remedies in the state's municipal law before they can bring a case to a regional or international judicial body.

The respondents claimed that they had exhausted all available remedies, but did not place any evidence to support this claim before the Tribunal. They further stated that, since the deportation of the third respondent, they could not seek any remedy within the applicant's territory.

The Tribunal stated that deportation alone did not amount to denial of access to the courts within the applicant's territory. The Tribunal concluded that all legal avenues within Tanzania had not been explored to contest the deportation order, and that the third respondent could have hired the services of legal advisers in the applicant's territory without being physically present therein to challenge, by judicial review, the deportation order made against him. The Tribunal subsequently held that the respondents had not exhausted local remedies and, therefore, did not have locus standi to institute proceedings before the Tribunal. The Tribunal's decision affirmed an earlier decision it had made in *Mike Campbell (PVT) Ltd and Others v The Republic of Zimbabwe*,[1] where it reiterated the principle that the Tribunal's jurisdiction only came into effect after the exhaustion of local remedies.

It is important to note that the SADC Tribunal is a legal avenue of last resort and cannot be used to supplement the legal processes of a signatory state.

1 SADC (T) 2/2007.

The Tribunal is already faced with challenges regarding the enforceability of and compliance with their decisions, and pronouncing on cases that have not been exhausted locally in a signatory state would only create further reason for signatory states to disregard the Tribunal's decisions with impunity. In the above-mentioned *Campbell* case heard by the Tribunal, not only did the executive arm of the Government of Zimbabwe publicly denounce the Tribunal's jurisdiction, but the courts also – in two separate judgments in Zimbabwe – found the Tribunal's decision not to be binding on the country.

In the first of these judgements, namely in *Gramara v Republic of Zimbabwe,*[2] the court was asked to determine whether the Tribunal was endowed with the requisite jurisdictional competence in the above-mentioned *Campbell* case; and secondly, whether the recognition and enforcement of the Tribunal's decision in that case would be contrary to public policy in Zimbabwe. The court held that since the Tribunal's decision challenged the decision of the Supreme Court of Zimbabwe, recognising the Tribunal's decision would undermine the Zimbabwean court's authority and would, therefore, contravene Zimbabwe's public policy – notwithstanding the international obligations of the Zimbabwean Government.

In the second judgement, i.e. in the case of *Etheredge v Minister of National Security*,[3] the Zimbabwean court held that the Tribunal Protocol did not intend to create a forum that would be superior to the courts in the subscribing countries. The court held further that it had superior jurisdiction to the Tribunal.

The local courts' decisions in both of these cases are incorrect since the fundamental tenet of international law is that of pacta sunt servanda, namely that every party to a treaty in force is required to perform its obligations thereunder in good faith and, as a corollary to that obligation, such party is not permitted to invoke the provisions of its internal law, including its constitution, as justification for its failure to perform under such treaty.[4] These cases nevertheless demonstrate the importance of the Tribunal in ensuring it acts within its jurisdiction and only grants locus standi to applicants within the strict parameters of the Protocol in order to have the Tribunal's judgments enforceable in the respective signatory states.

On the second preliminary objection to the rescission of the deportation order, the thrust of the applicant's objection involved issues pertaining to the admission and expulsion of aliens, and to expulsion resting within the powers of the state. The respondents also claimed that, during the process of the third respondent's deportation, he was subjected to torture.

2 HH 169–2009.

3 2009 HC 3295/08.

4 See Articles 2b and 27 of the Vienna Convention on the Law of Treaties (1969).

The Tribunal, after examining the definition of *torture* as defined in the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[5] decided that the respondents had not adduced any evidence to substantiate their allegations of torture or ill treatment that may have constituted an offence under international law. Therefore, the Tribunal was unable to determine whether the third respondent had in fact been subjected to torture or other cruel, inhuman or degrading treatment or punishment. The Tribunal further determined that the right to admit or to expel an alien remained squarely within the preserve of the applicant's sovereignty – subject to the observance of minimum human rights standards – for the treatment of aliens. The Tribunal subsequently held that the respondents had not substantiated their allegations of torture or ill-treatment so as to render the deportation order made against the third respondent an international delinquency.

The Tribunal's reference to the Convention Against Torture is noteworthy as it demonstrates that not only SADC Treaties and Protocols are applicable in the Tribunal: reliance can also be placed on other regional and international instruments.

5 United Nations General Assembly Resolution 39/46.