

EX PARTE: COMMERCIAL FARMERS UNION

**IN RE: THE STATUS OF RULINGS BY THE SOUTH AFRICAN
DEVELOPMENT COMMUNITY (SADC) TRIBUNAL VIS-À-
VIS THE GOVERNMENT OF ZIMBABWE**

OPINION

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Council of the Bar, South Africa)

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3 September 2009

A. **INTRODUCTION**

1. Our Consultant is the Commercial Farmers Union.
2. Over the past two years we have been engaged in litigation in the South African Development Community (SADC) Tribunal to obtain orders declaring the purported land seizure programme in Zimbabwe in breach of the country's international law obligations under the SADC Treaty. In November 2008 the Tribunal granted such an order, on three separate grounds. These were that the land seizure programme constituted racial discrimination, an infringement of the right of access to courts, and an arbitrary taking without adequate compensation, each in breach of Zimbabwe's Treaty obligations.
3. We have been informed of the public statement now by the Minister of Justice of the Government of Zimbabwe, Mr P Chinamasa M.P., asserting that **“any decision that the Tribunal may have or may make in future against the Republic of Zimbabwe is null and void”** and purporting to withdraw from the jurisdiction of the SADC tribunal. We have been asked to advise urgently as to the legal validity of this statement.
4. In our view, the assertion lacks any legal foundation. We note that it is made some ten months after the main ruling by the SADC Tribunal in favour of the applicant Zimbabwe farmers, their workers and families, and some three months after the finding by the Tribunal that the Government of Zimbabwe is acting in defiance of the main ruling, and awarding costs against the

Government of Zimbabwe. It also follows on a Tribunal ruling in favour of a Black Zimbabwe farmer whose land had also been seized under Land Bank legislation, also with a costs order against the Government of Zimbabwe. The statement significantly is made just days in advance of the SADC Summit's meeting, which has been asked by the Tribunal in terms of the latter order to consider enforcement steps against Zimbabwe as a SADC Member.

5. The grounds for our views are, in summary, fourfold:
 - (a) Zimbabwe is a signatory to the SADC Treaty;
 - (b) Zimbabwe is bound to the Protocol despite not ratifying it;
 - (c) Zimbabwe has conceded the SADC Tribunal's jurisdiction; and
 - (d) the SADC Tribunal has held that Zimbabwe is subject to its jurisdiction.

B. REASONS FOR OPINION

6. We deal with each of these grounds individually.

(a) Zimbabwe is a signatory to the SADC Treaty

7. Firstly, the SADC Treaty was entered into on behalf of Zimbabwe by its President at Windhoek, Namibia, on 17 August 1992. The Treaty was duly ratified thereafter by the Zimbabwean legislature on 17 November 1992. Subsequently, on 30 September 1993, the Treaty entered into force. The

Government of Zimbabwe has, of course, at no time challenged the legality of its membership of SADC.

8. Accordingly, by virtue of the international law rule expressed by the adage *pacta servanda sunt*,¹ the Treaty binds the Government of Zimbabwe. This legal conclusion is inescapable, as was accepted under oath on 27 January 2009 by the Attorney-General of Zimbabwe, Mr Johannes Tomana M.P (who, in terms of section 76(1) of the Constitution of the Republic of Zimbabwe, is the principal legal adviser to the Zimbabwean Government). Also the Deputy Attorney-General, Mr Prince Machaya, has accepted the Tribunal's competence and the Government's legal duty to abide the Tribunal rulings in a letter dated 8 May 2009, recording that **"[i]t is of considerable importance to Government that it is not seen to have a propensity for disregarding orders of the Tribunal"**. In his letter the Deputy Attorney-General admitted that on two separate occasions the Government of Zimbabwe disregarded the orders of the Tribunal and clearly recognised this to be in breach of Zimbabwe's international law obligations.

(b) Zimbabwe is bound to the Protocol despite not ratifying it

9. Secondly, the Protocol to the SADC Tribunal is, in terms of article 16(2) of the Treaty, binding on all SADC Members. That article provides that the Protocol constitutes an integral part of the Treaty, rendering ratification

¹ This principle forms part of customary international law, and is reaffirmed and codified in article 26 of the Vienna Convention on the Law of Treaties of 1969, which provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".

thereof unnecessary. The suggestion now by the Minister that separate ratification of the Protocol is required, is directly contradicted by article 16(2) of the Treaty.

10. Accordingly, Zimbabwe is bound by the Protocol, like any other SADC Member, despite not having ratified it. Also this inescapable conclusion has been accepted under oath by the Attorney-General of Zimbabwe. Moreover, the Republic has illustrated its acceptance of the Protocol's provisions by seconding a Supreme Court judge, Gowora JA, to the Tribunal.

(c) **Zimbabwe has conceded the SADC Tribunal's jurisdiction**

11. Thirdly, and unsurprisingly in the light of the above, the Government of Zimbabwe has during numerous stages in different proceedings before the Tribunal, formally conceded the Tribunal's jurisdiction over it.
12. Already during the first hearing of the **Campbell** proceedings before the Tribunal, the government of Zimbabwe formally conceded the Tribunal's jurisdiction. The concession was made through Zimbabwe's Deputy Attorney-General, who represented it in the proceedings, in answer to a question by Justice Tshosa, a member of the Tribunal. The concession was repeated in an affidavit filed in that matter on behalf of the Department of Lands, and affirmed in the government's continued appearances and submission of argument. Furthermore, in that matter, the High Commissioner for Zimbabwe herself attended the proceedings, and was furnished by the

government as the service address and designated agent under the Protocol, a designation repeated in unrelated subsequent proceedings against the Government of Zimbabwe.

13. The established legal position is that even had there been no other basis for the Tribunal to assume jurisdiction (which is clearly not the case here) the Government's submission to the Tribunal's jurisdiction itself established the Tribunal's jurisdiction.² Accordingly, Zimbabwe is bound to the rulings by the Tribunal, and cannot "withdraw" from its jurisdiction at this stage.

(d) **The SADC Tribunal has held that Zimbabwe is subject to its jurisdiction**

14. Finally, the designated SADC organ conferred by the SADC Treaty with the authority to interpret the provisions of the Treaty – hence to decide upon whether a State is bound by the Treaty and the Protocol and subject to the jurisdiction of the Tribunal – is the SADC Tribunal. The Tribunal has repeatedly held, after careful consideration of its own jurisdiction, that it did have the competency to adjudicate cases against the Government of Zimbabwe. Its ruling in this regard is conclusive.

²

Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries 1969 (2) SA 295 (A); H Clerk (Doncaster) Ltd v Wilkinson 1965 All ER 934 (CA); Standard Bank of SA v Minister of Bantu Education 1966 (4) SA 229 (N) at 242H; De Wet v Western Bank Ltd 1977 (4) SA 770 (T) at 779C-G; Joubert et al (eds) Law of South Africa (1st reissue 1999) vol 14 para 289 (text at notes 8-9).

15. Accordingly, also on the basis that the designated adjudicator has held Zimbabwe to be under its jurisdiction, the Government of Zimbabwe cannot responsibly contend that it is not bound by the Tribunal's rulings.

C. **CONCLUSION**

16. For these reasons it is our view that there is no *bona fide* basis for the contention that the rulings by the Tribunal do not bind the Government of Zimbabwe.

We advise accordingly.

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