THE SUPREME COURT OF APPEAL OF SOUTH AFRICA JUDGMENT

Case No: 657/11

In the matter between:

GOVERNMENT OF THE REPUBLIC OF and

LOUIS KAREL FICK First Respondent

RICHARD THOMAS ETHEREDGE Second Respondent

WILLIAM MICHAEL CAMPBELL Third Respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Fourth Respondent

Neutral citation: Government of the Republic of Zimbabwe v Fick &

others

(657/11) [2012] ZASCA 122 (20 SEPTEMBER 2012)

Coram: NUGENT, VAN HEERDEN and MALAN JJA, SOUTHWOOD and ERASMUS AJJA

Heard: 27 AUGUST 2012

Delivered: 20 SEPTEMBER 2012

Summary: Tribunal of Southern African whether competent ? whether binding on Zimbabwe. 2

ORDER

On appeal from North Gauteng High Court, Pretoria (R D Claassen J sitting as court of first instance):

The appeal is dismissed with costs that include the costs of two counsel.

JUDGMENT

NUGENT JA (VAN HEERDEN and MALAN JJA and SOUTHWOOD and ERASMUS AJJA CONCURRING)

[1] This appeal has a long history that I relate later in this judgment. For the moment a summary will suffice to explain what is before us. It arises from litigation between the Republic of Zimbabwe (the appellant, which I will refer to as Zimbabwe) and two former farmers in that country (the respondents) before the Tribunal of the Southern African Development Community (SADC). In one instalment of those proceedings the Tribunal ordered Zimbabwe to pay the legal costs of the respondents. Zimbabwe declined to do so, whereupon the respondents applied to the North Gauteng High Court to have the costs order recognised in this country.

The proceedings were commenced by edictal citation authorised by that court (Tuchten J). Zimbabwe declined to participate in the proceedings and an order was made by default by Rabie J recognizing the order of the Tribunal.

A writ of execution was then issued authorising the Sheriff for the district of Cape Town to attach immovable properties belonging to Zimbabwe and to sell them in execution of the Tribunal?s costs order.

[2] Zimbabwe was prompted into action when it became aware that its properties were scheduled to be sold in execution. Believing that the properties were to be sold writ it applied urgently to the North Gauteng High Court for relief aimed at setting it aside.1 Its belief was mistaken. It was not the respondents? writ that had initiated the scheduled sales but instead a writ that had 1Case No 77881/09.

2Case No 47945/10.

3Case No 72184/10.

4Government of the Republic of Zimbabwe v Fick (47945/10, 72184/10, 77881/09) [2011] ZAGPPAC 76 (6 June 2011).

[3] Zimbabwe then commenced a fresh application for rescission of the order that had been made by Rabie J recognizing the order of the Tribunal.2 Later it launched yet a further application for rescission of the order that had been made by Tuchten J.3

[4] The three applications ? the application to set aside the writ, the application to rescind the order of Rabie J, and the application to rescind the order of Tuchten J ? were consolidated and came before R D Claassen J, who dismissed them.4 Zimbabwe now appeals his order with the leave of the learned judge.

[5] I deal later with the Treaty that established the SADC and its Tribunal, and with its powers and functions, but it is as well first to expand upon that brief summary of the facts. 4

[6] The starting point is Zimbabwe?s land reform policy, which was incorporated in s 16B of its Constitution. That section was introduced by the Constitution of Zimbabwe Amendment Act 17 of 2004, with effect from 16 September 2005. The policy reflected in that section was elementary and to the point. In summary, agricultural land that had

been, or would in the future be, identified in the Gazette was confiscated by the state, without compensation other than for improvements on the land. The section went on to oust the jurisdiction of the courts to challenge a confiscation.

[7] The respondents were amongst those whose farms were confiscated.

Because the Constitution precluded challenges to the confiscation in the domestic courts the respondents, together with 76 others whose land had been confiscated, turned instead to the Tribunal for relief.

Mike Campbell (Pvt) Ltd v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008).

[8] Zimbabwe was represented in the proceedings before the Tribunal by its Deputy-Attorney General. It was submitted in argument before us by counsel for Zimbabwe that the Tribunal?s jurisdiction over Zimbabwe was challenged in those proceedings but that is not correct. What was said to have been a jurisdictional challenge was a dilatory objection taken to the proceedings on the grounds that they were premature, in that the applicants had not exhausted their domestic remedies.

Needless to say, bearing in mind the constitutional ouster of domestic remedies in Zimbabwe, the objection was dismissed. At a stage in the proceedings an application by Zimbabwe for a postponement was refused whereupon Zimbabwe?s representatives withdrew and failed to participate further.

[9] On 28 November 2008 the Tribunal found in favour of the applicants before it and made the following orders:

?For the reasons given, the Tribunal holds and declares that:

(a) by unanimity, the Tribunal has jurisdiction to entertain the application;

(b) by unanimity, the Applicants have been denied access to the courts of Zimbabwe;

(c) by a majority of four to one, the Applicants discriminated against on the grounds of race; and

(d) by unanimity, fair compensation is payable to the Applicants for their lands compulsorily acquired by the Respondent.

The Tribunal further holds and declares that:

(1) by unanimity, the Respondent is in breach of its obligations under

Article 4(c)6 and, by a majority of four to one, the Respondent is in breach of its obligations under Article 6(2)7 of the Treaty;

(2) by unanimity, Amendment 17 is in breach of Article 4(c) and, by a majority of four to one, Amendment 17 is in breach of Article 6(2) of the Treaty;

(3) by unanimity, the Respondent is directed to take all necessary measures, through its agents, to protect the possession, occupation and ownership of the lands of the Applicants, except for Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd, and France Farm (Pvt) Ltd that have already been evicted from their lands, and to take all appropriate measures to ensure that no action is taken, pursuant to Amendment 17, directly or indirectly, whether by its agents or others,

to evict from, or interfere with, the peaceful residence on, and of those farms by, the Applicants, and

(4) by unanimity, the Respondent is directed to pay fair compensation, on or before 30 June 2009, to the three applicants, namely,

Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd, and France Farm (Pvt) Ltd.

6Article 4(c): ?SADC and its Member States shall act in accordance with the following principles: ? (c) human rights, democracy and the rule of law.

7Article 6(2): ?SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as may be determined by the Summit.

[10] On 7 August 2009 Zimbabwe for the first time voiced an objection to the jurisdiction over it of the Tribunal in a letter written by its

Minister of Justice to the Registrar of the Tribunal. His letter referred to the Protocol under which the Tribunal had been established, and amendments to the SADC Treaty that I deal with later.

He said, amongst other things, that the Protocol was not binding upon Zimbabwe, in that it ?has not yet been ratified by the requisite two thirds of the total membership of SADC as provided for under Article 38 of the [Protocol], and that the amendment of the SADC Treaty had not yet entered into force, in that it ?has not yet been ratified by the requisite two thirds of the total membership of SADC as required under International Law and as read with Article 41 of the original Treaty, and in particular, had not been ratified by Zimbabwe. In those circumstances, it was said: ?we hereby advise that, henceforth, we will not appear before the Tribunal and neither will we respond to any action or suit that may be instituted or be pending against the Republic of Zimbabwe before the Tribunal. For the same reasons, any decisions that the Tribunal may have made or may make in the future against the Republic of Zimbabwe are null and void.

[11] Consistent with its expressed intentions Zimbabwe failed to comply with the Tribunal?s orders. On 7 May 2009 two of the applicants in those proceedings (the second and third respondents before us) once again approached the Tribunal, on that occasion for a declaration that Zimbabwe was in breach and contempt of its order.8 Once again Zimbabwe chose not to participate in the proceedings. On 5 June 2009 the Tribunal found that Zimbabwe had indeed failed to comply with its order and ruled that it would report its findings to the Summit for ?appropriate action to be taken, as provided for by Article 32(5) of the

8Campbell v Republic of Zimbabwe (SADCT) (03/2009) [2009] SADCT 1 (5 June 2009). 7

Protocol. It also ordered Zimbabwe to pay the applicants costs, to be agreed between the parties or, failing agreement, to be determined by the Registrar of the Tribunal. The costs could not be agreed and they were determined by the Registrar at US$ 5 816,47 and ZAR 112 780,13.

[12] In December 2009 the two applicants in that application, together with Louis Karel Fick, who had been amongst the applicants in the first case before the Tribunal, applied to the North Gauteng High Court for leave to commence proceedings against Zimbabwe by edictal citation. The proceedings contemplated were an application for orders declaring the rulings made by the Tribunal on 28 November 2008 and 5 June 2009 ?to be registered in terms of article 32 of the Protocol of the SADC Tribunal by the High Court of South Africa and ?declaring the quantum of the costs pursuant to the latter ruling to be as determined by the Registrar of the Tribunal. On 13 January that court (Tuchten J) authorized the proceedings and directed service of the application upon Zimbabwe by delivering a copy to the offices of the Attorney-General in Harare and upon the administrative head of its Minister of Justice in Harare.

[13] The application was duly served and Zimbabwe entered a notice of its intention to oppose the application, but withdrew that notice on 1 February 2010. It alleges that after filing the notice

of its intention to oppose it was ?advised that, as a sovereign state, it was judicious that it does not subject itself to the courts of another sovereign state, in this case the Republic of South Africa, and withdrew its notice on that advice. It alleges that a letter to that effect accompanied the notice of withdrawal but no such letter has been produced. 8

[14] The application came before Rabie J who granted the following order by default on 25 February 2010:

It is ordered that the rulings by the [SADC] Tribunal delivered on 28 November 2008 and 5 June 2009 are declared to be registered i.e. recognised and enforceable in terms of article 32 of the Protocol of the SADC Tribunal by the High Court of South Africa, and the quantum of the costs pursuant to the latter ruling is to be declared to be as determined by the Registrar of the SADC Tribunal in the allocator attached, namely US$ 5 816.47 and ZAR 112 780.13.

[15] I deal first with the two applications before the court below to rescind the orders made by Tuchten J and Rabie J respectively.

[16] Rule 42 of the Uniform Rules allows for rescission of a judgment granted in the absence of a party. As pointed out by this court in Colyn v Tiger Food Industries Ltd9 the rule contemplates the correction of mistakes or irregularities and is for the most part a restatement of the common law.

In order to succeed at common law an applicant must show good cause, which generally requires an applicant to (a) give a reasonable explanation for the default (b) show that his application is bona fide and (c) show that he has a bona fide defence to the claim that prima facie has some prospect of success.10

92003 (6) SA 1 (SCA) paras 6 and 11.

10At para 11.

[17] It is not necessary to deal with the first two requirements. In both cases Zimbabwe has failed to demonstrate that the orders ought not to have been granted. I commence with the order made by Tuchten J.

[18] On the face of it rescission of the order made by Tuchten J is misconceived because the order has already been exhausted.

Nonetheless, 9

I think it emerges from the affidavit filed in support of that application, and from argument that ensued, that the application was directed in substance to a declaration that the main proceedings were a nullity. There are two primary grounds upon which that case was advanced. The first was that Zimbabwe was said to have had sovereign immunity from civil proceedings in this country. The second was that it was said not to have been competent to commence the proceedings by edictal citation. For both contentions Zimbabwe relied upon the provisions of the Foreign States Immunities Act 87 of 1981.

[19] Before dealing with those submissions it is convenient shortly to dispose of a subsidiary attack upon the order. It is well established that an applicant for ex parte relief must make full

disclosure of all facts relevant to the order that is sought and that where the applicant fails to do so a court has a discretion to set aside the order on that ground alone.

There is no suggestion that material facts were withheld in this case.

But it was submitted that the respondents had failed to disclose in their affidavits the provisions of the Act. The respondents were not obliged to make reference in their founding affidavit to laws that might have been relevant to their application. No doubt counsel who moves an ex parte application is obliged to bring to the attention of the court any laws of which he or she is aware that might impact upon the application but that is something else. I should add that there is no reason to believe that counsel who moved the application breached that duty.

[20] The Act provides in s 2 that ?[a] foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in the Act, or in any proclamation issued thereunder (there are no such proclamations that are now material) and that ?[a] court shall give effect

10 to the immunity conferred by this section even though the foreign state does not appear in the proceedings in question. But under s 3 a foreign state forfeits that immunity ?in proceedings in respect of which the foreign state has expressly waived its immunity. In this case it is clear that Zimbabwe forfeited such immunity as it might have had by expressly submitting itself to the SADC Treaty and the Protocol. I elaborate upon that finding after I have dealt with other issues relating to those instruments later in this judgment.

[21] So far as its objection to the commencement of the proceedings is concerned counsel for Zimbabwe relied upon s 13 of the Act, which provides for service of process upon foreign states as follows:

(1) Any process or other document required to be served for instituting proceedings against a foreign state shall be served by being transmitted through the Department of Foreign Affairs and Information of the Republic to the ministry of foreign affairs of the foreign state, and service shall be deemed to have been effected when the process or other document is received at that ministry.

(2) Any time prescribed by rules of court or otherwise for notice of intention to defend or oppose or entering an appearance shall begin two months after the date on which the process or document is received as aforesaid.

(3) A foreign state which appears in proceedings cannot thereafter object that subsection (1) has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a foreign state except on proof that subsection (1) has been complied with and that the time for notice of intention to defend or oppose or entering an appearance as extended by subsection (2) has expired.

(7) ? subsection (1) shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction of the court.

[22] In support of his submission that service in that manner is peremptory counsel for Zimbabwe referred us to a decision of the

United States Court of Appeals for the Fifth Circuit in the matter of Magness v Russian Federation.11 I do not think that decision is of assistance and I need not deal with it. It was

decided on a construction of the statute in question, which does not correspond with the present statute.

11We were furnished with a typescript copy of the judgment and not its citation.

[23] Under Rule 5(1) the leave of the relevant court is required to serve process instituting proceedings outside the Republic. Subsection (7) of the Act makes it clear that that applies as much where proceedings are brought against a foreign state. I have some difficulty seeing why a court that may authorize proceedings against a foreign state should be precluded from directing how service should take place. Although s 13 is expressed in peremptory terms it is not uncommon for such language to be construed as being permissive when seen in its context. But in any event in this case Zimbabwe appeared in the proceedings by noting its intention to oppose.

While that does not in itself constitute a submission to the jurisdiction of the court subsection (3) makes it plain that having done so it cannot thereafter object to the manner of service.

[24] It was also submitted that the proceedings are a nullity because the notice of motion did not allow two months for Zimbabwe to note its intention to oppose as provided for in subsection (2). That submission has no merit.

That section operates to preclude default judgment being granted ? by which I mean judgment in default of the respondent noting its intention to oppose the proceedings ? before expiry of that period.

Once the respondent entered the proceedings quite obviously the purpose of the provision was achieved.

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[25] There are no grounds for finding that the proceedings were improperly commenced and the court below correctly refused to rescind? the order made by Tuchten J. I turn to the order made by Rabie J.

[26] It was submitted that it was not competent for a court in this country to recognise the order of the Tribunal for various reasons.

Most of those were advanced before and rejected by Patel J in the High Court of Zimbabwe in a related case Gramara (Pvt) Ltd v Government of the Republic of Zimbabwe12 ? in which two of the applicants in the main proceedings before the Tribunal applied to register in Zimbabwe its orders of 28 November 2008.

12(HC33/09) [2010] ZWHHC 1 (26 January 2010).

[27] The submissions were repeated in this court without any attempt to demonstrate where the learned judge had erred. It would be superfluous to reformulate the erudite reasoning of the learned judge for rejecting the submissions that are relevant to this appeal, and I quote liberally from those parts of his judgment in which he did so, respectfully adopting as my own the reasoning of the learned judge.

[28] The first submission was that an order of the Tribunal, even if binding upon Zimbabwe, is not enforceable in this country. Precisely why that is so was not fully developed in argument but

it falls to be rejected, if only on common law grounds. The common law on the subject was expressed by Patel J as follows:

Both in England and in South Africa, it is well established that foreign judgments are recognizable and enforceable under the common law. See North and Fawcett: Cheshire and Norths Private International

Law (13th ed. 2004) at 407; Forsyth: 13

Private International Law (4th ed. 2003) at 389. In South Africa, the procedure for and scope of recognition proceedings are lucidly expounded in Joubert (ed.): The Law of South Africa (First Reissue, 1993) Vol. 2 at para.

476, as follows:

... the present position is that a foreign judgment is not directly enforceable in South Africa; but if it is pronounced by a proper court of law and certain requirements are met any determination therein (for example of a party?s rights or status) will be recognized and the judgment will in fact found a defence of res judicata if it would have founded such a defence had it been a South African judgment. In addition, an authenticated foreign judgment constitutes a cause of action and as such is enforceable by ordinary action in a South African court, including, where appropriate, an action for provisional sentence or for a declaratory order or for default judgment.

A South African court will not pronounce upon the merits of any issues or factor of law tried by the foreign court and will not review or set aside its findings though it will adjudicate upon a ?jurisdictional fact establishing international competency?.

The general requirements for recognition and enforcement of foreign judgments are set out in Joubert (op cit), at para 477. These requirements were adopted and applied by the Appellate Division in Jones v Krok 1995 (1) SA 677 (A) at 685B-E and in Purser v Sales 2001 (3) SA 445 (SCA) at 450D-G.

In Jones?s case, CORBETT CJ summarized these requirements as follows: As explained in Joubert ..., the present position in South Africa is that a foreign judgment is not directly enforceable, but provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognized 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.

[29] While the authorities referred to in that passage from the judgment are directed at the enforcement of a judgment of the domestic courts of a 14 foreign country I see no reason to disagree with Patel J that they are applicable as well to an order of an international tribunal whose legitimacy has been accepted. There is also no question that the order now sought to be enforced satisfies all the requirements of paras

(ii)-(vi)13 tabulated in the extract from the judgment in Jones v Krok that is cited in the passage above. What remains is only whether the Tribunal had jurisdiction to entertain the case, which was hotly contested by Zimbabwe, as foreshadowed by the letter written by its Minister of Justice that I referred to earlier.14

13The two cases differ in this respect that what was sought to be enforced in that court was the orders made in the main proceedings. In that regard Patel J held that to enforce those orders in Zimbabwe would be contrary to public policy in that it would run counter to the Constitution of Zimbabwe that expressly allowed for its land reform policy. Needless to say those considerations do not apply in this country. But in any event the present case is directed at the costs order made by the Tribunal, albeit that the order of Rabie J extended to the main proceedings as well.

14Counsel for Zimbabwe referred us in argument to a paper written by Richard Frimpong Oppong: Enforcing judgments of the SADC Tribunal in the domestic courts of member states (apparently yet to be published) while interesting, the paper does not assist in deciding this case.

[30] There is yet a further reason why the order of the Tribunal is enforceable in this country which is that Zimbabwe submitted itself to its enforceability ? but it is convenient to revert to that after dealing with the jurisdictional question.

[31] It is surprising that the jurisdiction of the Tribunal should be contested by Zimbabwe, bearing in mind that its Deputy-Attorney General raised no such objection when he appeared before the Tribunal on behalf of Zimbabwe, that Zimbabwe nominated one of its judges to membership of the body, and that its own high court has rejected the contention. Nonetheless, the contention having been raised it is necessary to deal with it. For that I need to outline the circumstances in which the Tribunal was [32] The SADC was constituted under a Treaty signed in Windhoek in August 1992 by the heads of state or government of certain states in the southern African region,15 including Zimbabwe, and ratified by the signatory states as required by Article 40.16 The Treaty came into force the following year under Article 41.17

15The People?s Republic of Angola, the Republic of Botswana, the Kingdom of Lesotho, the Republic of Malawi, the Republic of Mozambique, the Republic of Namibia, the Kingdom of Swaziland, the United Republic of Tanzania, the Republic of Zambia and the Republic of Zimbabwe.

16Article 40: This Treaty shall be ratified by the signatory States in accordance with their constitutional procedures.

17Article 41: This Treaty shall enter into force thirty (30) days after the deposit of the instruments of ratification by two thirds of the States listed in the Preamble.

[33] The Treaty created various institutions that included the Summit the supreme policy-making institution of the SADC which comprised the heads of state or government of member states (Article 10).

Provision was made in Article 36(1) for amendment of the Treaty by adoption of the amendment ?by a decision of three quarters of all the Members of the Summit.

[34] Article 16 provided for the establishment of the Tribunal. Its establishment and its powers and procedures were provided for as follows:

1. The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.

2. The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol adopted by the Summit.

5. The decisions of the Tribunal shall be final and binding.

[35] A Protocol on the Tribunal was signed by the heads of state or governments of member states (who comprised the Summit) in 2000. It provided in Article 35 that [t]his Protocol shall be ratified by Signatory States in accordance with their constitutional procedures and in Article 38 that

[t]his Protocol shall enter into force thirty (30) days after deposit in terms of Article 43 of the Treaty, of instruments of ratification by two thirds of the States.

[36] Whether the Protocol was ratified as required by Article 35 is neither here nor there. In 2002 it was amended, under the hand of the presidents or heads of government of all Member States (including Zimbabwe) by the deletion of articles 35 and 38. Whatever the position might have been before that, clearly the adoption of the amended Protocol, constituting its adoption by the Summit, made it binding upon Member States.

[37] But, submitted counsel for Zimbabwe, the Protocol, and its amendments, required ratification under Article 22 of the Treaty. That Article, in the original Treaty, provided as follows:

1. Member States shall conclude such Protocols as may be necessary in each area of co-operation, which shall spell out the objectives and scope of, and institutional mechanisms for, co-operation and integration.

2. Each Protocol shall be approved by the Summit on the recommendation of the Council, and shall thereafter become an integral part of this Treaty.

3. Each Protocol shall be subject to signature and ratification by the parties thereto.

[38] That Article must be seen in its context. It appears in Chapter 7 of the Treaty, which deals with co-operation between member states.

In 17 brief the chapter provides that member states will co-operate to foster regional development and integration in the areas of food security, land and agriculture, infrastructure and services, and so on. The protocols referred to in that Article are clearly protocols concluded to that end and not to the Protocol on the Tribunal.

[39] Any doubt there might be on that score is dispelled by an amendment that was made to Article 16 in 2001 under the signature of the heads of state or government of all the member states, which by then included other states,18 amongst which was the Republic of South Africa. Perhaps the draftsman was not alive to the fact that the protocols referred to in that Article were confined to protocols on co-operation, or perhaps the draftsman wished merely to eliminate doubt, but subsection (2) of Article 16 was amended by the insertion of the words I have underlined ; so as to read as follows:

8The Democratic Republic of the Congo, the Republic of Mauritius, the Republic of Seychelles, and the Republic of South Africa. 2. The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit.

[40] The position taken by Zimbabwe, however, is that the amendments that were made to the Treaty were also not binding upon it. For his finding that Zimbabwe was bound by the Protocol the learned judge in Gramara relied upon the amendment (perhaps himself overlooking the fact that protocols under Article 22 were in any event confined to protocols for co-operation), and rejected the submission that it was not binding. His reasons for finding that Zimbabwe was bound by the amendment, and thus by the Protocol, were expressed as follows: 18 Article 39 makes it abundantly clear that ratification by two-thirds of the signatory States was a pre-requisite for the entry into force of the Treaty itself. However, amendments to the Treaty are governed by an entirely different procedure prescribed in Article 36.1, as follows:

An amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit?. The term ?Summit? is defined in Article 1 of the Treaty as: ... the Summit of the Heads of State or Government of SADC established by Article 9 of this Treaty?.

Article 10 of the Treaty (in its unamended form) is instructive as to the composition of the Summit and its decision-making process. It provides as follows in its relevant portions:

1. The Summit shall consist of the Heads of State or Government of > all Member States, and shall be the supreme policy-making institution of SADC.

3. The Summit shall adopt legal instruments for the implementation of the provisions of this Treaty ....

8. Unless otherwise provided in this Treaty, the decisions of the Summit shall be by consensus and shall be binding.?

The combined effect of these provisions is that an amendment to the Treaty is not concluded by way of ratification by Member States but is adopted by a decision of not less than three-quarters of the Summit, comprising the Heads of State or Government of all Member States.

Furthermore, the decision of the Summit to adopt the amendment is binding on all Member States. The amendment becomes operative immediately thereafter and there is no need for any further ratification by Member States in order to bring the amendment into force and effect.

Article 9.1(f) as read with Article 16 provides for the establishment of the SADC Tribunal. Article 16.2 as amended provides that:

The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit.

[Amendment underlined] 19 The meaning and effect of the amending words are clear, to wit, Protocol of the Tribunal forms an integral part of the Treaty without the need for its ratification by the Member States. To clarify this position and dispel any doubt on the matter, all the Member

States, including Zimbabwe, concluded and signed the Agreement Amending the Protocol on Tribunal on the 3rd October 2002. By virtue of Articles 16 and 19 of this Agreement, Articles 35 and 38 of the Protocol of the Tribunal, which required ratification of the Protocol by two-thirds of the Member States, were repealed in toto, thereby obviating the need to ratify the Protocol.

To conclude this aspect of the case, my assessment of and determination on the jurisdictional capacity of the Tribunal is as follows. 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. In my view, there can be no doubt whatsoever that the Agreement was duly adopted in terms of Article 36.1 of the Treaty and that it became binding upon all the Member States on the date of its adoption. It follows that as from that date, by virtue of Article 16.2 of the Treaty as amended, 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.

It also follows that the Republic of Zimbabwe thereupon became subject to the jurisdiction of the tribunal and that the jurisdictional competence of the Tribunal in the Campbell case, which was heard and determined in 2008, cannot now be disputed.

[41] Persisting in Zimbawe's contention that it was not bound by the amendments to the Treaty its counsel submitted next that the Vienna Convention on Treaties 1969 demanded that the amendments be ratified.

That submission, too, has no merit. The Convention makes itself clear that the terms of any particular treaty determine the manner in which it becomes binding. [42] There is no merit in the submission that Zimbabwe is not bound by the Treaty as amended, or by the Protocol as amended. Indeed, I associate myself with the following observations of Patel J: 20 [The Government of Zimbabwe's] position in this regard, premised onthe ex post facto official pronouncements repudiating the Tribunal's jurisdiction, is essentially erroneous and misconceived. Their position is rendered even more untenable by the conduct of SADC governments, including the Government of Zimbabwe, subsequent to the adoption of the Amendment Agreement, which conduct has been entirely consistent with the provisions of the Treaty as amended by the Agreement.

[43] The consolidated Protocol as it stood at the time relevant to this appeal contained the following provisions: Article 14 BASIS OF JURISDICTION 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) (c) .

Article 15: SCOPE OF JURISDICTION

1. The Tribunal shall have jurisdiction over disputes between Member > States, and between natural or legal persons and Member States. 2. No natural or legal person shall bring an action against a Member State unless he or she has exhausted all available remedies or is unable to proceed under the 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.

Article 32: ENFORCEMENT AND EXECUTION

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

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.

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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. [44] It was not disputed before us, and was expressly acknowledged in the affidavits filed by Zimbabwe, that Article 32(3) renders decisions of the Tribunal enforceable in the territories of all member states.

By its adoption of that Article Zimbabwe clearly both waived any immunity it might otherwise have been entitled to claim from the jurisdiction of the courts of member states and agreed that orders of the Tribunal would be enforceable in those courts.

[45] While it was submitted that the Treaty and the Protocol has not been domesticated in this country, in that it has not been ratified by Parliament, that submission misses the point. It is not that the instruments are being enforced ? only that by its act Zimbabwe has submitted to the jurisdiction and enforcement. No grounds have been advanced why Zimbabwe should not be held to its express undertakings.

[46] There is one further matter that can be disposed of briefly. I pointed out earlier in this judgment that the Tribunal, having found that Zimbabwe had defied its order, ruled that the matter be referred to the Summit for appropriate action to be taken. It appears that the Zimbabwe authorities took the opportunity to voice their objections to other member states, and that discussions ensued that had not reached finality by the time the present proceedings were commenced. On that basis it was submitted before us as I understand the submission that the order may not be enforced until those discussions have been concluded. 22

[47] There is no basis for that submission. Article 32(5) of the Protocol requires the Tribunal, once having found that a member state has failed to comply with its decision, to report its finding to the Summit for the latter to take appropriate action. The action contemplated by that Article is action directed at compelling the offending state to mend its ways. That Zimbabwe has engaged its fellow members in discussions aimed at reaching an alternative solution is no reason why the order may not meanwhile be enforced.

[48] No defence to the respondents claim for recognition and enforcement of the costs order of the Tribunal has been demonstrated by Zimbabwe and its application to rescind the order was rightly refused.

[49] There remains the application to suspend the writ. In their heads of argument counsel for Zimbabwe submitted that the writ had not been served. While that might provide grounds for

resisting the sale of its property it is immaterial to the validity of the writ. No further grounds were advanced for setting aside the writ and the court below cannot be faulted for having dismissed that application.

[50] The appeal is dismissed with costs that include the costs of two counsel.

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R W NUGENT

JUDGE OF APPEAL 23

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