UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Denkleiers • Leading Minds • Dikgopolo tša Dihlalefi

Making a case for the resuscitation of the Southern African Development Community (SADC) Tribunal

By:

SIVE MAKHULATHI (21839222)

Submitted in fulfilment of the requirements for the Master of Laws (LLM) degree in International Trade and Investment Law in Africa.

Centre for Human Rights, Faculty of Law, University of Pretoria

Supervisor: Dr Femi Oluyeju

Submitted on 30 September 2021.

Word Count: 23 735.

DECLARATION

I, Sive Makhulathi, declare that **Making a case for the resuscitation of the Southern African Development Community (SADC) Tribunal** is my work. This work has never been submitted to any other institution of learning for any academic or other award. All references to sources and any quotations cited have been indicated and acknowledged herein.

SIGNED at **Pretoria** on this **27th** day of **September 2021**.

_____

DEDICATION

To my father Elias Makhulathi.

To my mother Nosayini Makhulathi.

To all the beautiful children in orphanages.

To all the marginalised and minority groups in Africa.

To all the children born and raised in rural communities.

To my younger sisters Mivuyo Makhulathi and Nosiviwe Makhulathi

ACKNOWLEDGEMENTS

I am grateful to the University of Pretoria - Centre for Human Rights, for granting me the opportunity to register for the TILA LLM Programme.

I am thankful to the National Research Foundation (NRF) for its financial assistance for my LLM studies.

I would like to express my heartfelt appreciation to Dr Ntandokayise Ndlovu for his unwavering love and support throughout my studies and for his valuable comments on my work. I am forever indebted to you, Gatsheni, *wenzenjalo nakwabanye*.

My sincere gratitude to my supervisor Dr Femi Oluyeju, Professor RM Phooko and my learned friend Thando George for their insightful comments on my work.

I would like to thank Siphamandla Makhulathi, Ongezwa Makhulathi, and Luzuko Mgwede for their love and care.

I appreciate my friends Simbongile Landani, Gugu Tom, Alunge Wayi, Halalisani Xulu, Zethu Dekeda, Nkosikhona Fanaphi and Zimkhitha Mbhekeni for all the love and support throughout my LLM journey.

Special thanks to the TILA LLM Programme Manager, Dr Jonathan Kabre and the TILA Class of 2021 for the welcoming environment, support and for making my LLM journey wonderful.

KEY WORDS

Access to justice

African regional integration

Enforcement

Human rights jurisdiction

Individual complaints

Interstate disputes

Regional Economic Community Courts

Role of subregional courts

SADC Community law

SADC Tribunal

ABBREVIATIONS

African Charter/The Banjul Charter	African Charter on Human and People's Rights
African Commission	African Commission on Human and People's Rights
African Court/ACHPR	African Court on Human People's Rights
AMU	Arab Maghreb Union
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CEN-SAD	Community of Sahel-Saharan States
CERD	Convention on the Elimination of all Forms of
COMESA	Common Market for Eastern and Southern Africa
African Commission	African Commission on Human and People's
CSOs	Civil Society Organisations
DRC	Democratic Republic of Congo
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EU	European Union
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
ICCPR	International Covenants on Civil and Political Rights.
ICESCR	International Covenants on Economic, Social and Cultural Rights.
IGAD	Inter-Governmental Authority on Development

REC	Regional Economic Community
SADC	Southern Africa Development Community
SADCAT	SADC Administrative Tribunal
SADCC	Southern African Development Community Co-ordinating Conference
Universal Declaration	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

ABSTRACT

The birth of the SADC Tribunal marked a period of hope for human rights victims in the SADC. Initially, the Tribunal could hear commercial, labour and human rights law disputes. Individuals who no longer have hope on their national courts, could bring the complaints to the Tribunal. However, a very dramatic change took place following the challenges in the Zimbabwean expropriation of land without compensation. Following the defeat in the land grabs case, the *Campbell case*, instead of complying with court ruling the Zimbabwean government lobbied other SADC member states to challenge the jurisdiction of the Tribunal.

This challenge to the human rights jurisdiction was calculated to render the Tribunal ineffective. The SADC states saw the Tribunal as nothing other than a monster that their sovereignty. Subsequently, the Tribunal was suspended, with the adoption of the new 2014 Protocol to the Tribunal. The new Protocol limits the jurisdiction of the Tribunal to interstate disputes only and excludes the submission of human rights complaints by individuals and entities from the region. This undoubtedly and unjustifiably deprive SADC citizens of their right of access to justice.

Not only that this create a gap in the eyes of justice, it also reduces the role of the court as one of the institutions of the SADC. The Constitutional Court of South Africa has ruled that the suspension of the Tribunal and ordered the President of South Africa to withdraw from the new 2014 Protocol. This was followed by the Tanzanian High Court, which left the consideration of the signature to the new Protocol a matter of the Executive. Therefore, this writing make a case for the restoration of the SADC Tribunal. In its advocacy, this study focuses on the role played by regional courts in integration and the need of the Tribunal on human rights natters from individual complaints.

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

1.1 Background to the study

1.1.1 Africa's regional integration

One of the notable characteristics of the post-colonial era in Africa is the continent's willingness to unite in many fronts. The creation of the Regional Economic Communities (RECs) is one of Africa's strategies to work towards Africa's integration and development of the continent.[1] Regional economic integration has therefore been defined as:

> The co-ordinating of economic activities, with the aim of enhancing the development of countries or regions. It involves elimination of tariff and non -tariff barriers to the flow of goods; services and factors of production between a group of nations, or different parts of the same nation.[2]

The African leaders achieved this goal when Africa ratified the Abuja Treaty establishing the African Economic Community in 1994 (Abuja Treaty).[3] There are eight RECs recognised in the African context, namely: Arab Maghreb Union (AMU), East African Community (EAC), Economic Community of West African States (ECOWAS), Southern Africa Development Community (SADC), Community of Sahel-Saharan States (CEN SAD), Inter-Governmental Authority on Development (IGAD), Common Market for Eastern and Southern Africa (COMESA) and Economic Community of Central African States (ECCAS).

While there is an array of RECs, this study focuses on the Southern Africa Development Community (SADC), a regional economic community that is made up of 16 member states in Southern Africa including Angola, Botswana, the Democratic Republic of the Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Comoros and Zimbabwe. and which seeks to deepen integration in Southern Africa.

---

[1] T Hartzenberg 'Regional Integration in Africa' Trade Law Centre for Southern Africa (tralac) Manuscript date: October 2011, 4. Available at https://www.wto.org/english/res_e/reser_e/ersd201114_e.pdf (accessed 30 April 2021).

[2] DE Kawenda 'Legal integration as a means to Regional Economic Integration: A Southern African perspective' 2016 13(2) *Jurnal Hukum Internasional* 188 at 189.

[3] Abuja Treaty establishing the African Economic Community in 1994. See also T Shumba 'Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models' LLD Thesis, Stellenbosch University, 2014 at 65 (on file with the author).

1.1.2 The Southern Africa Development Community (SADC)

The SADC emerged from its predecessor, the Southern African Development Co-ordinating Conference (SADCC). The SADC was established by the Southern Africa Development Community Treaty (the SADC Treaty), which is the main document establishing other SADC agreements. The SADCC was formed by the frontline states: namely Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. At this stage, South Africa was facing exclusion from Africa's regional integration due to apartheid and discriminatory policies. South Africa then joined in 1992 when the institution transformed from SADCC to SADC. At this point, South Africa was on its road to the dawn of democracy.

The SADC was established by the Southern Africa Development Community Treaty (The SADC Treaty), which is the main document establishing other SADC agreements. The SADC Treaty created institutions[4] for the implementation of the SADC Treaty, including the SADC Tribunal.[5] Pursuant to Article 16(1)[6] of the SADC Treaty Protocol on the Tribunal and the Rules of Procedure,[7] the SADC Tribunal was established. The Tribunal was set up to interpret the SADC Treaty, to protect the interests and rights of SADC member states and their citizens, and to develop community jurisprudence, having regard to applicable treaties, general principles, and rules of public international.[8]

Article 15 of the Protocol allowed individual persons and corporations of the SADC to institute cases against a member state, provided they have exhausted local remedies. However, the ruling of the Tribunal against the Zimbabwe's land reform policy in *Mike Campbell (Pvt) Ltd and Others v The Republic of Zimbabwe (Campbell case)*,[9] marked the demise of the Tribunal. Subsequently, the Summit of Heads of State and Government of the SADC, suspended the work of the Tribunal and agreed that a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to inter-State disputes. Following this, the Summit announced its decision to lay aside the SADC Tribunal and 'that in the interim, SADC member countries will engage in a process of re-negotiating a new Protocol that will re-establish the

[4] Article 9(1) (a-h) of the SADC Treaty.
[5] Article 9(1)(g) of the SADC Treaty.
[6] Article 16(1) stipulate that: '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.'
[7] Protocol on the Tribunal and the Rules of Procedure (SADC Protocol).
[8] OC Ruppel 'The Southern African Development Community (SADC) and its Tribunal: Reflexions on a Regional Economic Communities' Potential Impact on Human Rights Protection'2009 42(2) *Verfassung und Recht in Übersee* 173 at 181.
[9] SADC (T) 02/2007. See B Chigara 'What Should a Re-constituted Southern African Development Community (SADC) Tribunal Be Mindful of to Succeed' (2012) 81 *Nordic Journal of International Law* 341 at 350.

Tribunal and that in its incarnation, the Tribunal will no longer entertain disputes from private persons as was the case before.'[10](*emphasis added*).

1.2 Research problem

Since the suspension and the adoption of the new Protocol to the Tribunal, only state parties can bring disputes for resolution before the SADC Tribunal. This means that the individuals and juristic persons that participate in the commercial and trade traffic are excluded to bring commercial, labour and human rights disputes as it was the case before the suspension of the Tribunal. The regional dispute settlement is necessary for the effective and efficient integration in Africa to improve integration through easy movement of persons, goods and services in the continent.

Peoples' access to a regional judiciary body is key for accountability, human rights protection, and the deepening rule of law and democratic principles enshrined in the SADC Treaty. Therefore, the limitation of the jurisdiction of the court to inter-state dispute not only deny the SADC citizens' rights to access justice, but is also contrary to the objectives of the Abuja and SADC Treaties to facilitate regional integration. It leaves a gap as citizens who have exhausted local remedies cannot have recourse when dissatisfied by the ruling of the domestic court.

1.3 Research aims and objectives

At the heart of this research is the objective to advocate for the restoration of the SADC Tribunal, from a regional integration perspective. It aims to examine the role of the SADC Tribunal in deepening regional integration. To this end, this study seeks to:

i. critically analyse the available SADC legal framework, governing the existence of the SADC Tribunal;
ii. investigate the role of the SADC Tribunal, as one of the SADC pillar institution, in deepening regional integration;
iii. examine the human rights implications of the limited jurisdiction of the SADC Tribunal;
iv. interrogate and address the gap which resulted in the disbandment of the SADC Tribunal;
v. to t seek to demonstrate the benefits and need to resuscitate the SADC Tribunal with expansive jurisdiction.

[10] O Jonas 'Neutering the SADC Tribunal by Blocking Individuals' Access to the Tribunal' (2013) 2 *International Human Rights Law Review* 294 at 295.

1.4 Research question(s)

At the heart of this study, the main question is whether the SADC Tribunal should be resuscitated? In answering the main question, this study will address the following sub questions:

i. What is the SADC legal framework, governing the existence of the SADC Tribunal?
ii. What is the role of the SADC Tribunal in the SADC REC?
iii. What are the legal implications of the restricted jurisdiction of the SADC Tribunal on human rights and access to justice?

1.5 Research hypothesis

This study will argue that there is need to address the gap in the SADC settlement of disputes. It will advocate for the resuscitation of the SADC Tribunal. The study will prove that the SADC region still need to have its regional independent and effective judiciary body. The study will also show that it is necessary to expand the jurisdiction of the SADC Tribunal to hear cases brought by the citizens of the SADC. It will be shown that the disbandment of the SADC Tribunal has the potential to hinder regional integration. It will be illustrated that Civil Society Organisations in the SADC region can play very huge role in ensuring that the SADC Tribunal regains its expansive jurisdiction, as the main judiciary body of the SADC.

1.6 Research methodology

This study will be a desktop based qualitative research and will be based on available literature and jurisprudence in relation to the subject at hand. First, this study will make use of the primary resources of law, which include but not limited to relevant treaties, protocols and case law. Secondly, secondary resources will be also utilised, including books, journal articles, publications by SADC and non-SADC organisations. The study will also make use of internet resources such as reports, academic articles and other scholarly publication. Moreover, a large section of this study will be descriptive, but a comparative analysis will be also made. In the end, this study will show the combination of a descriptive character as well as the comparative analysis aspect.

1.7 Literature review

The proper functioning of the RECs in Africa was ensured by the creation of structures within the blocs, including the adjudicatory bodies.[11] The main reason was the deepening of regional integration. In the SADC, the Tribunal was created and, it entertained not only the disputes between states but also human rights cases brought by individuals of the SADC bloc. When the SADC Summit disbanded the Tribunal, one of the question that arose in scholarship, pertained the SADC Tribunal jurisdiction on human rights matters. This is because, these sub-regional courts are primarily concerned with interpretation of the regional community law.[12]

For Murungi and Gallinetti: 'the evolution of protection of human rights as an agenda of RECs and as part of the jurisdiction of their courts is unique to each one of them, and the approaches adopted in this regard are also different. Thus to trace these developments, it is necessary to look at some of these RECs and their courts in turn.'[13] Ruppel opines that 'Considering that human rights do, to some extent, form part of the community law of all RECs, their regional community courts can unquestionably contribute towards the promotion and protection of human rights, provided that decisions by regional judicial institutions are properly enforced at a national level.'[14]

Viljoen[15] argues that it is difficult to exclude the human rights protection in the SADC Tribunal following the view in *Campbell* that even though there is no bundle of human rights found in the SADC laws but basis for such reasoning can be found in SADC Treaty objective to uphold foundational principles of the human rights, democracy and rule of law. In this regard, the SADC Tribunal in the *Campbell case,* held as follows: 'It is clear to us that the Tribunal has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law… the respondent cannot rely on its national law…to avoid its legal obligations under the Treaty.'[16]

---

[11] See B Sang Yk 'Friends, Persons, Citizens: Comparative Perspectives on *Locus Standi* and the Access of Private Applicants to Sub-Regional Trade Judiciaries in Africa' (2011) 13(2) *Oregon Review of International Law* 355 at 357.

[12] LN Murungi and J Gallinetti 'The Role of Sub-Regional Courts in the African Human Rights System.' (2010) 7(13) *Sur-International Journal on Human Rights* 119 at 121.

[13] Murungi and Gallinetti (n 12) at 119.

[14] O Ruppel 'Regional economic communities and human rights in East and Southern Africa' in A Bosl and J Diescho (Ed) *Human Rights Law in Africa: Legal perspectives on their Protection and Promotion* (2009) at 282.

[15] F Viljoen *International Human Rights Law in Africa* (2012) 492. Article 4 of the SADCV Treaty set out the principles of sovereign equality of all member states; solidarity, peace and security; human rights; democracy and the rule of law; and the peaceful settlement of disputes.

[16] *Campbell case* (n 10) page 25.

The Tribunal justified its position by invoking Article 27 of the Vienna Convention on the Law of Treaties,[17] which provides that 'a party may not invoke provisions of its own internal law as justification for failure to carry out an international agreement.' This supports the view that the Tribunal has jurisdiction on human rights matters. Barnard opines that[18] the fact that there is no treaty on human rights in the SADC region and effective sub regional judiciary body which will play a role in enforcing the laws of the region is problematic and it should be concerning in the modern scholarship.

In response to the fall of the SADC Tribunal, the Constitutional Court of South Africa in *Law Society of South Africa (LAWSA) and Others v President of the Republic of South Africa and Others*[19] provided the basis for the revival of the SADC Tribunal. It held that the conduct of the then President of South Africa, in signing of the 2014 Protocol on the SADC Tribunal which restricted the jurisdiction of the SADC Tribunal to interstate disputes, was unlawful, unconstitutional and irrational.[20] It should be noted that dispute settlement mechanism is not only key for purposes of resolving disputes but it guarantees efficiency by providing a means through which discord between actors can be reduced.[21] It is also noteworthy that states are not directly involved in international trade but big multi-national corporations and transnational companies are actually involved.

Oppong,[22] argues that the African courts were established under regional economic integration treaties and therefore carries the mandate which falls into the definition of an international courts as a dispute resolution mechanism that settle disputes between parties, in which at least one of the parties must be a state. These subregional courts play a crucial role in deepening regional integration in Africa. They form part of the structures that are meant to drive the African economic integration[23] and their effectiveness and impact matters. Nyirongo[24]

[17] Vienna Convection on the Law of Treaties, 1969.
[18] M Barnard 'Constitutionalising a Human Right to Water in the Southern African Development Community' (2020) 16 *Utrecht Law Review* 60 at 69. See also RF Oppong 'Legitimacy of Regional Economic Integration Courts in Africa' (2014) 7 *African Journal of Legal Studies* 61 at 62. See also ST Ebobrah 'Tackling Threats to the Existence of the SADC Tribunal: A Critique of Perilously Ambiguous Provisions in the SADC Treaty and the Protocol on the SADC Tribunal' (2010) 4 *Malawi Law Journal* 199 at 211.
[19] 2018 ZACC 51 at para 105. (*Law Society case*).
[20] *Law Society case* (n 19).
[21] Y Nagu 'Opinion: will the African Continental Free Trade Area's dispute settlement protocol be adequate to ensure compliance' (2020) 7(1) *Journal of Comparative Law in Africa* 120 at 121.
[22] Oppong (n 18).
[23] Oppong (n 18) at 64.
[24] R Nyirongo 'The role of law in deepening regional integration in Southern Africa – a comparative analysis of SADC and COMESA' LLM Thesis, University of Cape Town, 2017 at 20. (On file with the author).

concludes that 'the legal and institutional framework of the communities, the establishment of judicial organs was imperative for the enforcement of community law.'

The RECs willingness to uphold and ensuring that rule of law is the cornerstone in the cross-border trade. As Steyn[25] puts it: 'This includes ensuring access to justice, the easy enforcement of legal rights, an independent judiciary and effective dispute resolution mechanisms. Efficient and independent regional and local courts may provide an alternative to arbitration in resolving commercial and other disputes.' Mussi[26] raises a concern that states are reluctant to give their sovereignty to a judicial organ. One would argue that this is the case with the SADC states. However, the Constitutional Court of South Africa paved the way for SADC countries to push the agenda for the SADC Tribunal revival.[27] In *Tanganyika Law Society v. Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania and the Attorney General of the United Republic of Tanzania*[28] the Tanzania High Court expressed the view that the disbandment of the SADC Tribunal hamstrung the foundational principle of rule of law.

Whereas, the scholarship seems to be more concerned with the question of jurisdiction of the African sub-regional courts on human rights matters, this study not only focuses seek to provide an informed view to this issue, but it goes beyond to deal with the role of these regional courts in the regional integration initiative. This study focuses on the SADC and advocates for the primary expansive jurisdiction to be conferred back to the Tribunal for settlements of cross border disputes.

1.8 The structure of the dissertation

Chapter 1 will provide the introduction of the study. It provides the background to the study. The chapter also outlines the research methodology that will be employed, research questions and the statement of the research problem.

Chapter 2 will provide an overview of the SADC Community law, governing the SADC Tribunal.

---

[25] P Steyn 'The important role of regional courts in the African Continental Free Trade Area – The Mseto judgment by the East African Court of Justice' Legal Brief (July 2020). Available at https://www.werksmans.com/legal-updates-and-opinions/the-important-role-of-regional-courts-in-the-african-continental-free-trade-area-the-mseto-judgment-by-the-east-africa (Accessed 29 May 2021).

[26] F Mussi 'From the Campbell Case to a Recent Ruling of the Constitutional Court of South Africa: Is There Any Hope to Revive the Tribunal of the Southern African Development Community?' (2020) 28 *African Journal of International and Comparative Law* 110 at 115.

[27] See MR Phooko & M Nyathi 'The revival of the SADC Tribunal by South African courts: A contextual analysis of the decision of the Constitutional Court of South Africa' (2019) *De Jure Law Journal* 415 at 432.

[28] Cause No. 23 of 2014 (Judgment delivered on 6 June 2019) at 46.

Chapter 3 presents the significance of the SADC Tribunal as crucial pillar to deepen regional economic integration.

Chapter 4 will focus on the restricted jurisdiction, the relationship between regional integration and the human rights and access to justice in the SADC. It also makes a comparative analysis with the ECOWAS.

Chapter 5 will consist of the conclusion of the study and recommendations to pave the way forward

CHAPTER 2

THE APPLICABLE SADC LEGAL FRAMEWORK

2.1 Introduction

The law plays a significant role in facilitating regional integration by creating a legal framework which forms the basis of the relationship between the community states and within which economic interchange can take place.[29] As Shumba puts it 'regional integration can be achieved more significantly if conducted within a rules-based framework.'[30] Besides the fact that an argument can be made that there has been a poor implementation of the 'SADC law', it does not mean that the legal framework does not exist. It has been acknowledged that the Southern Africa Development Community (SADC) follows a ruled-based system as it established in terms of certain multilateral rules and notified under the General Agreement on Tariffs and Trade (GATT) Article XXIV.[31]

The SADC has adopted several treaties to ensure effective compliance by its member states. Many treaties have been adopted for different specific purposes, thus, establishing a proper legal framework in the region. In as far as the establishment of the SADC Tribunal is concerned, the provisions can be traced from the Treaty establishing the SADC as well as from the treaty establishing the Tribunal itself. Against this background, this chapter seeks to set out and discuss the treaty provisions establishing and governing functioning of the SADC Tribunal. It discusses the provisions of the Treaty Establishing the Southern African Development Community as well as the Protocol on the Tribunal in the Southern African Development Community (2000). However, this chapter starts will start by introducing the 'SADC law.'

2.2 The Southern Africa Development Community (SADC) law

A regional bloc usually establishes laws applicable to and which govern the relations within that established community of trade. These laws will not only relate to the community treaties but also the operations of the bloc or community, setting out internal rules and procedures applicable to the bloc and the institutional framework. There is the so-called 'community law' which includes the treaties, protocols, regulations, decisions, principles, objectives and general

[29] T Shumba 'Harmonising Business Laws in the Southern African Development Community (SADC): Should SADC Member States Join OHADA' (2016) *Stellenbosch Law Review* 27(1) 59 at 59.
[30] Shumba (n 29) 59.
[31] G Erasmus 'Is the SADC trade regime a rules-based system?' (2011) 1 *SADC Law Journal* 1 at 17.

undertakings within the bloc.[32] Erasmus define the *community law* concept to 'refer to the binding legal instruments of a specific REC.'[33] This law is said to be international law of its own kind as the state parties are rights bearers and can litigate to enforce rights.[34] This is not to say that only states can litigate but also individuals may litigate.

In the SADC, the SADC law has been defined as 'the body of principles, rules and institutions adopted and created by SADC as a regional economic organization in order to foster regional integration and development in the state parties to the SADC Treaty.'[35] Any SADC regulations and other treaties of the community also make up the SADC community law.[36] Article 21 (b) of the SADC Protocol on the Tribunal also allows the Tribunal to develop the 'community jurisprudence having regard to applicable treaties, general principles and rules of public international law.'

In other words, the SADC law is informed by those fundamental principles of the World Trade Organisation (WTO) multilateral trading regime, before any protocol or agreement made by the SADC. These principles encompass but are not limited to the most-favoured nation and national treatment principles which are the two main principles promoting non-discrimination under the WTO/GATT regime. SADC law also consists not only binding legal instruments but also non-binding legal instruments with persuasive value, such as model laws and memoranda of understanding. Such non-binding instruments are persuasive because they enjoy some form of political support from the member states.

The SADC law, as it relates to the SADC Tribunal, is defined by the Protocol on the SADC Tribunal to mean 'the SADC Treaty and the SADC Protocols which have come into effect, all subsidiary instruments which have legal effects adopted by the Summit, by the Council or by

[32] R Oppong 'Making regional economic community laws enforceable in national legal systems – constitutional and judicial challenges' in A Bosl (eds) *Monitoring Regional Integration in Southern Africa Yearbook* (2008) at 149.
[33] G Erasmus 'The domestic status of international agreements: has the South African Constitutional Court chartered a new approach and could regional integration benefit?' in A Pisani, G Erasmus & T Hartzenberg (eds) *Monitoring Regional Integration in Southern Africa Yearbook* 2012 at 11.
[34] Nyirongo (n 24) 22.
[35] DP Zongwe 'An Introduction to the Law of the Southern African Development Community' (February 2011). Available at https://www.nyulawglobal.org/globalex/Southern_African_Development_Community.html (Accessed 19 August 2021).
[36] R Phooko 'The Direct Applicability of SADC Community Law in South Africa and Zimbabwe: A Call for Supranationality and the Uniform Application of SADC Community Law' (2018) 21 *Potchefstroom Electronic Law Journal* 1 at 17.

any other institution or organ of the Community pursuant to the Treaty or Protocols'[37] Thus, the discussion focus on these instruments.

2.3 The SADC Treaty

The SADC was formed as an international regional organisation established in terms of a treaty and declaration known as the *Treaty of Southern African Development Community* signed by the heads of state and government of the signatory Member States.[38] The Southern African Development Community Treaty (SADC Treaty 1992) is the major treaty as it constitutes the founding document of the SADC region. The treaty has been acknowledged as not only a statement of intent and resolve to overcome the burden of history but also an acknowledgement of the immense benefits of regional economic integration. [39] The SADC Treaty therefore provides the legal framework of the organisation by providing, amongst other things, the status, principles and objectives, obligations of Member States, and dispute settlement.[40]

2.3.1 The cornerstone provisions of the SADC Treaty

The Treaty requires that the SADC Member state observe and abide by the principles of sovereign equality of all Member States, solidarity, peace and security, human rights, democracy and the rule of law; equity, balance and mutual benefit; and peaceful settlement of disputes.[41] These are general principles that apply to and are enforceable against any SADC Member by virtue of signing the Treaty. In interpreting article 4 (c) of in the *Campbell case*, the SADC Tribunal held that, the duty to respect human rights and rule of law on the SADC states means that the SADC states ought to work individually and as a group of states to ensure that there is democracy and rule of law in the SADC community.

Matters involving human rights thus invited the intervention of the SADC Tribunal. The SADC principles set out in Article 4 of the SADC Treaty are supported objectives set out in Article 5 of the Treaty. Article 5 provides that:

> The objectives of the SADC shall be to: (a) promote sustainable and equitable economic growth and socioeconomic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration; (b) promote common political values, systems and

[37] G Erasmus 'The domestic status of international agreements: has the South African Constitutional Court chartered a new approach and could regional integration benefit?' in Pisani, Erasmus and Hartzenberg (n 33) 12.
[38] A Saurombe 'The role of SADC institutions in implementing SADC treaty provisions dealing with regional integration' (2012) 15(2) *Potchefstroom Electronic Law Journal* 454 at 457.
[39] Saurombe (n 38) 454.
[40] Saurombe (n 38) 457.
[41] Article 4 (a) – (e) of the SADC Treaty, 1992.

> other shared values which are transmitted through institutions which are democratic, legitimate and effective; (c) consolidate, defend and maintain democracy, peace, security and stability; (d) promote self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States; (e) achieve complementarity between national and regional strategies and programmes; (f) promote and maximise productive employment and utilisation of resources of the Region; (g) achieve sustainable utilisation of natural resources and effective protection of the environment; (h) strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the Region; (i) combat HIV/AIDS or other deadly and communicable diseases; (j) ensure that poverty eradication is addressed in all SADC activities and programmes; and (k) mainstream gender in the process of community building.[42]

Together, Articles 4 and 5 of the SADC Treaty, thus form the cornerstone in the interpretation and enforcement of the SADC law, whether it is the SADC Treaty itself or any other SADC Agreement or Protocol. However, for abiding member states, Articles 4 and 5 set out the standards within which the members can set their laws. Significantly, are undertakings made by the SADC member states as set out in Article 6 of the SADC Treaty. SADC states bargain to:

> adopt adequate measures to promote the achievement of the objectives of SADC;[43] to refrain from taking any measure that has likelihood to damage and danger the established principles, the achievement of its objectives and the implementation of the provisions of this Treaty;[44] not to discriminate against any person based on the listed grounds and any analogous ground; not to discriminate against any Member State;[45] take all steps necessary to ensure the uniform application of this Treaty;[46] take all necessary steps to accord the SADC Treaty the force of national law; and co-operate with and assist institutions of SADC in the performance of their duties.

[42] Article 5 (1) (a)-(k) of the SADC Treaty. These objectives must be read with article 5 (2) which provides that: In order to achieve the objectives set out in paragraph 1 of this Article, SADC shall: (a) harmonise political and socio-economic policies and plans of Member States; (b) encourage the people of the Region and their institutions to take initiatives to develop economic, social and cultural ties across the Region, and to participate fully in the implementation of the programmes and projects of SADC; (c) create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions; (d) develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States; (e) promote the development of human resources; (f) promote the development, transfer and mastery of technology; g. improve economic management and performance through regional co-operation; (h) promote the coordination and harmonisation of the international relations of Member States; i. secure international understanding, co-operation and support, and mobilise the inflow of public and private resources into the Region; and (j) develop such other activities as Member States may decide in furtherance of the objectives of this Treaty.

[43] Article 6(1) of the SADC Treaty.

[44] Article 6(2) of the SADC Treaty.

[45] Article 6(4) of the SADC Treaty.

[46] Article 6(6) of the SADC Treaty.

It is submitted that the Treaty provisions are not enough to make the Treaty applicable within the national laws of the state.[47]

2.3.2 The SADC law and national laws

Since the supremacy of the SADC laws over national is not clear,[48] the binding nature of the SADC laws on its member states largely depends on whether the member state is following the monist approach or the dualistic approach.[49] Under the former, the international law/treaty (in the present case, the SADC law) would automatically apply to a state upon ratification and when there is friction between the national law and the international law, the international law is supreme and will thus override the national laws.[50] Under the latter, the international law will apply to a state if the state not only ratify the treaty but also give effect to domesticate the treaty law by enacting national legislation.[51]

In terms of this monist approach, international law is therefore directly enforceable in national courts without any need to enact national legislation, while under the dualistic approach international law cannot be enforced in national courts without being incorporated into a domestic legislation.[52] In the SADC region, the states also follow different approaches. In South Africa, for example, it is said that both approaches apply. The matter is dealt with under section 231 of the Constitution of the Republic of South Africa. This section provides as that:

> (1) The negotiating and signing of all international agreements is the responsibility of the national executive. (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national

[47] F Zenda 'The SADC Tribunal and the Judicial Settlement of International Disputes' LLD Thesis, University of South Africa, 2010 at 38. (On file with the author).
[48] Phooko (n 36) 6.
[49] MR Phooko 'Revisiting the Monism and Dualism Dichotomy: What Does the South African Constitution of 1996 and the Practice by the Courts Tell Us about the Reception of SADC Community Law (Treaty Law) in South Africa?' (2021) 29(1) *African Journal of International and Comparative Law* 168 at 170.
[50] Phooko (n 49).
[51] Phooko (n 49).
[52] G Ferreira & A Ferreira-Snyman 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014) 17(4) *Potchefstroom Electronic Law Journal* 1471 at 1471.

> legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.[53]

This provision adopts the dualistic approach to international treaties. The position is, however, different when dealing with customary international law. In terms of the South African Constitution, customary international law is binding law in the Republic and need not be incorporated into a legislation to be enforceable before South African courts.[54] In Zimbabwe, another SADC member state, section 327 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 ("Zimbabwean Constitution of 2013") provides that: 'An international treaty which has been concluded or executed by the President or under the President's authority (a) does not bind Zimbabwe until it has been approved by Parliament; and (b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.'[55]

In so far as customary international law is concerned, section 326 of the Zimbabwean Constitution of 2013 provides that 'it is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament.'[56] It is thus clear that whilst South Africa has a combination of the two approaches, Zimbabwe follows the dualistic approach. The implication of this is that the SADC law does not automatically enjoy supremacy over the national laws of these countries. The approaches are also different in other SADC countries. To a larger extent, this is an impediment in the application and implementation of the SADC law by the SADC countries, let alone SADC countries that do not even sign or ratify SADC treaties at all.

2.3.3 The SADC Treaty institutions

The SADC Treaty creates various institutions that are to act as pillar engines in implementing the treaty provisions and driving integration in the SADC region. The institutions created include: the SADC Summit which is the highest policy-making body made up of the Heads of States;[57] the Council of Ministers (The Council) which exercises oversight function over the implementation of policies and programs of SADC and the operations of SADC institutions;[58] the Secretariat which is responsible for implementing the policies of SADC;[59] and the SADC

[53] Section 231(1) - (4) of the South African Constitution.
[54] Section 232 of the South African Constitution.
[55] Section 327 of the Constitution of Republic of Zimbabwe 2013.
[56] Section 326 of the Constitution of Republic of Zimbabwe 2013.
[57] Article 9(1)(a) of the SADC Treaty.
[58] Article 9(1)(c) of the SADC Treaty.
[59] Article 9(1)(f) of the SADC Treaty.

Tribunal which is the only regional court in the SADC responsible resolving.[60] There are also other various institutions established by Article 9 which also provide a good support system for the SADC integration progress.

All these are cornerstone institutions of the SADC that should play a very crucial role in pushing the agenda of regional integration in the region. They are all creations of the SADC Treaty and without these institutions, regional integration would be stagnant in the SADC community. All these institutions are equally important and each should work to towards achieving the objectives of the SADC Treaty. In terms of Article 17, however, the member states cannot interfere with the functioning. When it comes to the Tribunal, it is an independent body which cannot be held accountable by anyone but must perform its functions subject to the SADC Treaty and SADC community law[61] and must do so with impartiality.

In this dissertation, as noted thus far, the main concern is with the SADC Tribunal as one of the pillar institutions for driving and fostering integration in the SADC region. Article 16 of the SADC Treaty provides for the establishment of the SADC Tribunal to ensure adherence to and the proper interpretation of the provisions of this SADC Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it. This provision must be read in conjunction with Article 32 which requires that any dispute arising from the interpretation or application of the SADC Treaty, the interpretation, application or validity of Protocols or other subsidiary instruments to the Treaty, be referred to the Tribunal, provided that they cannot be settled amicably.

This means that the Tribunal cannot be a dispute settlement mechanism of first instance. This Article provides for the adoption of Treaty that will govern the Tribunal.[62] In this regard, the Protocol on the Tribunal in the Southern African Development Community (2000) was adopted as will be discussed below.

2.4 The Protocol on the SADC Tribunal and Rules (2000)

The Protocol on the Tribunal and Rules Thereof of 2000 was signed at the ordinary summit of SADC heads of state in Windhoek, Namibia.[63] The Protocol is one of its own kind in the SADC

[60] Article 9(1)(g) of the SADC Treaty.
[61] Zenda (n 47) 105.
[62] Article 16(2).
[63] Dr Mthandazo Ngwenya 'The reinstatement of the SADC Tribunal is a fundamental human rights issue that requires SADC citizens to engage their governments for its immediate reinstatement.' Bigen Group (Johannesburg) 20 August 2020. Available at https://bigengroup.com/the-sadc-tribunal-what-it-means-for-human-rights-in-the-region/ (Accessed 22 August 2021).

Protocols as it requires no further ratification by the member states.[64] This is because of Article 9(1)(f) of the SADC Treaty which establishes the Tribunal, and state parties are thus bound by the Protocol from the day it came into force. This is unique because for many other SADC Protocols, a state member of the SADC is only bound after ratifying such a Protocol.

Article 14 of the Protocol allows the Tribunal to have jurisdiction over *all* disputes and *all* applications referred to the Tribunal in accordance with the SADC Treaty and the Protocol provided that such matters relates to 'interpretations and applications of the treaty; interpretations, application or validity of the protocols, all subsidiary instruments and acts of the institutions of SADC; and in areas where states concluded agreements and wherein the Tribunal is conferred jurisdiction.' It is said that this provision, which is a foundation basis for jurisdiction of the Tribunal, demonstrates that it was created with a primary focus on interstate disputes.[65]

However, the contrary can be argued as will be shown in the following chapter that the Provisions of Article 14 can be interpreted in line with Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) which requires that a treaty be interpreted *in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*.' In light, of this article, for example, the jurisdiction of the Tribunal, as set out in Article 14, ought to be understood considering the principles and objectives of the SADC Treaty. It is worth noting that the Tribunal cannot interpret the SADC Community law in isolation.

But the Tribunal is allowed to apply the provisions of the SADC Treaty and its subsidiary instruments and consider applicable treaties, general principles and rules of public international law and any rules and principles of the law of States, in order to develop the jurisprudence of the Tribunal.[66] Zenda suggests that the 'general principles of public international law and the law of states' as referred to in the Protocol make it sufficient for the Tribunal to cover the fields covered by the International Court of Justice.[67] These sources can be classified as primary and secondary. The former includes treaties, customary law, and general principles recognized by

[64] J Obonye 'Neutering the SADC Tribunal by Blocking Individuals' Access to the Tribunal' (2013) 2(2) *International Human Rights Law Review* 294 at 297.
[65] Obonye (n 64) 297.
[66] Article 21(b) of the Protocol.
[67] Zenda (n 47) 19. See Article 38(1) of the Statute of the International Court of Justice (ICJ Statute). Article 38(1) of the ICJ Statute lists the sources of international law.

civilized nations while the latter consists of judicial decisions and the teachings of highly qualified publicists.

Although it is said that article 38 is not a complete point of reference when finding sources of international law, this is not a concern, at least for the purposes of this dissertation.[68] The author further goes on to suggest that the fact that the jurisprudence of this court is thus relevant in the SADC Tribunal.[69] Very significantly, under article 15, the Protocol sets out the scope of the Tribunal. The Tribunal can entertain disputes amongst state parties;[70] disputes between natural or legal persons and states, provided that all internal remedies have been exhausted by the natural or legal person including cases where there is inability to proceed with litigation or secure remedies under domestic law of the member state.[71]

Giving effect to this provision in *Bach's Transport (Pty) Ltd v Democratic Republic of Congo (Bach's Transport case)*[72] the Tribunal expressed the view that where evidence is presented and indicates that a party tried to have a dispute resolved under domestic law, then the Tribunal has powers to entertain the matter. The Tribunal (as per Judge President AG Pillay, as he was then) held as follows:

> Clearly, there is evidence supported by documents that the Applicant tried to utilize the legal system of the Respondent to have its truck and trailer released but was unsuccessful. It even tried to use the diplomatic channels available but was equally unsuccessful. It was clearly unable to proceed under the domestic legal system of the Respondent… Consequently, the Tribunal considers that the Applicant has tried unsuccessfully to obtain redress under the municipal legal system of the Respondent. The Tribunal, therefore, holds that it has the jurisdiction to entertain the application.[73]

The Judge President went on to refer to circumstances where the law will deem the local remedies to have been exhausted by an individual and quoted with approval the previous judgement of the Tribunal in the *Campbell case.*[74] It is thus submitted that the Protocol

[68] See I Khan 'Article 38 of the Statute of the International Court of Justice: A Complete Reference Point for the Sources of International Law?' The New Jurist (Pölten) (5 April 2019). Available at https://newjurist.com/article-38-of-the-statute-of-the-international-court-of-justice.html (Accessed 22 August 2021).
[69] Khan (n 68).
[70] Article 15(1) of the Protocol on the Tribunal.
[71] Article 15(2) of the Protocol on the Tribunal.
[72] SADC (T) 14/2008, SADCT 6 (11 June 2010).
[73] *Bach's Transport case* at 7.
[74] *Campbell Case* (n 10) at page 21. In this case, the Tribunal held that where domestic law provides no solution to a dispute or even in cases where the solution is provided by domestic law but cannot be effective, then no requirement of exhaustion of internal remedies is expected from the part of the applicant or an individual. These are usually extremely cases where seeking local remedies is meaningless, in such circumstances the individual is allowed to refer the matter and seek relief from the international Tribunal. In other words, in such circumstances the law will deem an individual to have in fact exhausted the local remedies. However, the applicant will bear the burden to prove that they have in fact sought remedial action or provide evidence that the local remedies are not

provisions were in line with international law rule of exhaustion of local remedies. Once a party has taken a stance and submitted the matter to the Tribunal, no consent is required from any other parties against whom the case is brought.[75]

2.5 Conclusion

It is apparent that the SADC has adopted the main treaty which is very comprehensive. The treaty is the major treaty in the SADC in that it creates the SADC itself, set out the process and procedures in for the SADC region. It establishes various cornerstone institutions, set out the fundamental principles, objectives and undertakings which form bases for the SADC integration. Of utmost significance, the SADC has its 'community law' through its enactments and treaties adopted, including the SADC Treaty and its subsidiary instruments. These enactments and treaties make up the legal framework within which the SADC govern its own procedures. It is also noted that the established institutions played a very crucial role in fostering regional integration in the region.

It is also noted that the SADC Tribunal which is crucial institution of the community responsible for resolving disputes, is also a creation of the SADC enactment, the Protocol on the Tribunal. The Protocol and its Rules, set out the jurisdiction, powers and composition of the Tribunal. It is also noted that the Protocol is unique as it forms integral part of the Treaty. The Protocol allows the Tribunal to hear cases brought by individuals and states. However, in the case of individuals, they must have exhausted local remedies before resorting to the tribunal. It is also important to note that the Tribunal is given a mandate to develop its own jurisprudence and, must also consider international law.

The instruments discussed in this chapter thus form the basis and legal framework when dealing with issues to the SADC Tribunal. The Tribunal is the creature of these instruments combined as such they are main legal sources of reference. However, useful as it may be, the Tribunal was suspended by the SADC Summit following the famous Campbell case and a new Protocol limiting the jurisdiction of the Tribunal to interstates dispute was proposed. The suspension of this regional is problematic as the Tribunal is one of the cornerstone institution in fostering

effective. Where the argument of exhaustion of local remedy is denied, the burden of proof is distributed as the respondent will is required to prove that the local remedies were in fact available, adequate and effective. See the International Court of Justice in the *Norwegian Loans case* (1957) I.C.J. Rep. 27 at p.3. See also B Robertson 'Exhaustion of Local Remedies in International Human Rights Litigation: The Burden of Proof Reconsidered' (1990) 39(1) *The International and Comparative Law Quarterly* 191 at 193.

[75] Article 15(3) of the Protocol on the Tribunal.

integration in the SADC region. The following chapter, thus, focus on the Tribunal's fall, the new Protocol, and explore the role of the Tribunal in regional integration.

CHAPTER 3

THE SADC TRIBUNAL AND THE ROLE OF REGIONAL COURTS IN INTEGRATION

3.1 Introduction

The SADC Tribunal is the first sub-regional court in the SADC. It is one of the institutions established by the SADC Treaty that are aimed at supporting regional integration in the region. It was established as the main institution for purposes of resolution of disputes. The Tribunal has faced challenges leading to closure. It has not been operating since the *Campbell case*. The Tribunal was seen as a threat to the SADC country, a blockade in the land grabbing process in Zimbabwe was disbanded by the SADC Summit for reasons that were political motivated. The Summit politicians thus lobbied each other to ensure that the Tribunal is less powerful in upholding the rule of law in the SADC Community law.

Following the suspension of the Tribunal after the famous *Campbell case*, the new 2014 Protocol on the SADC Tribunal, which restricts the jurisdiction of the Tribunal to interstate state disputes, was proposed. Some states have ratified the Protocol and some have not ratified it. South Africa has recently withdrawn its signature to the Protocol following the 2018 Constitutional Court judgement that the signing of the Protocol was irrational and unconstitutional. The Tribunal is an important independent judicial body in the SADC region to uphold the rule of law which cannot be left in the hands of politicians, and it ought to be revived with its primary expansive jurisdiction.

Against this backdrop, this chapter seeks to give an overview of the original Tribunal and its fall after the *Campbell case*. It discusses and comments on the adoption of the 2014 Protocol and its effect. It then examines and clarify the role of sub-regional courts in fostering regional integration. In the end, the discussion seeks to make proposal to revive the Tribunal.

3.2 The SADC Tribunal

The SADC Tribunal is one regional courts that was designed as an institution of SADC in terms of Article 9(g) read in conjunction with Article 16 of the SADC Treaty. The mandate of the Tribunal was to ensure adherence to the proper interpretation of the provisions of the Treaty and subsidiary instruments, and to adjudicate upon such disputes as may be referred to the Tribunal.[76] The SADC Tribunal was established in 1992, with the aim to allow the resolution

[76] Article 16(1) of the SADC Treaty.

of matters not only relating to economic cooperation in the SADC region, but also to entertain human rights matters in the SADC region like the ECOWAS Community Court of Justice.[77]

The whole idea was to allow people of a particular community to have a convenient forum for the resolution of disputes when they are not satisfied with national or local remedies. Ebobrah suggests that the establishment of the SADC Tribunal was a 'symbol of hope' for human rights activists due to the challenges of limited individual access to the African Court on Human and Peoples' Rights (African Court).[78] As such, the tribunal has been called the 'House of Justice for Africa.'[79] The SADC Tribunal is one of the sub-regional courts created by African countries, as a REC court, since Africa's economic integration. It was created as one of the institutions established by Article 9 (1) of the SADC Treaty.[80]

Primarily, the existence of the Tribunal was to ensure adherence to and proper interpretation of the provisions of the SADC Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it. Thus, the Tribunal became the main judiciary body of the SADC. Because the Tribunal is one of the SADC Treaty institutions and thus forms the integral part of the Treaty, at least, strictly speaking, the Tribunal was established on 30 September 1993 when the SADC Treaty became operational.[81] Be that as it may, it took more than a decade to have the Tribunal operating and hearing matters, because the SADC Member States failed to adopt an instrument that would enable the Tribunal to carry out its mandate.

As Asmelash puts it: 'It took another 12 years before it [The Tribunal] became operational. This was due to delays in adopting the protocol that stipulates the composition, powers, functions, procedures and other matters governing the activities of the Tribunal, as envisaged in Article 16 (2) SADC Treaty.'[82] Perhaps, looking at this delay, the short-lived life span of the Tribunal should not be a surprise, and one ought to admit that the unreasonable delay and

[77] Mia Swart 'A house of justice for Africa: Resurrecting the SADC Tribunal' Brookings Institution Press (Washington, DC) 02 April 2018. Available at https://www.brookings.edu/blog/africa-in-focus/2018/04/02/a-house-of-justice-for-africa-resurrecting-the-sadc-tribunal/ (Accessed 04 September 2021). See F Cowell 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction' (2013) 13(1) *Human Rights Law Review* 153 at 165.
[78] Ebobrah (n 18) 200.
[79] Swart (n 77).
[80] HB Asmelash 'Southern African Development Community (SADC) Tribunal' (15 February 2016) at 2. MPILux Research Paper 2017 (10), Max Planck Encyclopaedia of International Procedural Law. Available at SSRN: https://ssrn.com/abstract=3405935 (Accessed 04 September 2021).
[81] Asmelash (n 80).
[82] Asmelash (n 80).

indecisiveness of the SADC in choosing the appropriate forum of resolving its disputes was due to the political ego of the member states.

The SADC states wanted a solid and reliable dispute settlement mechanism for the community to attract the investors, yet the political arrogance could not allow the states to opt for a supranational court.[83] They were fearing to subject their sovereignty to a such a powerful court. Many of the SADC member states were of the view that it would be appropriate to have a forum for arbitration and mediation. However, since the establishment of the body was to be funded by the European donors, they were of the view that needed more than an arbitration and mediation mechanism but rather a more effective dispute settlement mechanism.[84] In this regard Lenz state the following:

> This context of external dependence constrained policy-makers' choices. It was paramount for them to retain the credibility and legitimacy with external aid and investment partners and signal to them that the new integration effort justified their continued support. One of the ways to do this is to draw on the credibility of established models, especially those favoured by external partners, by 'visibly' emulating (some of) its central features, while retaining a more sovereignty-preserving institution 'in practice'. This is what the Tribunal stipulation in the Windhoek Treaty did.[85]

The Tribunal Protocol was finally adopted together with the Rules of Procedure Thereof and it came into force through an amendment to the SADC Treaty, since the SADC two-thirds majority requirement could not be met. The amendment was done by the 21st SADC Summit held in Malawi, 2001.[86] In line with Articles 3 and 4[87] of the Protocol to the Tribunal, the judges to serve in the Tribunal were appointed on 18 August 2005.[88] On 18 November 2005, the

[83] On supranational courts, Mosler writes: 'supra-national, as it is used in international relations today is imprecise due to having both a wider and a more restricted meaning. The more restricted meaning is used in the so-called "integrated" Economic Communities of regional groups of States. Supra-nationalism in this sense, as first defined in the negotiations preparing the establishment of the European Communities, has two essential features, the first of which is the power of one or more organs of the community to act, in accordance with the constituent treaty, directly within the domestic jurisdiction of all member States without interference by national governments or authorities and with direct legal effect; the second is the independence of the executive organ from the member States.' H Mosler 'Supra-National Judicial Decisions and National Courts' (1981) 4(2) *Hastings International & Comparative Law Review* 425 at 435.

[84] KJ Alter, JT Gathii & LR Helfer 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27(2) *The European Journal of International Law* 293 at 307.

[85] T Lenz 'Spurred Emulation: The EU and Regional Integration in Mercosur and SADC' (2012) 35(10) *West European Politics* 155 at 165.

[86] F Cowell 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction' (2013) 13(1) *Human Rights Law Review* 153 at 165.

[87] Article 3(1) provides that The Tribunal shall consist of not less than ten (10) Members, appointed from nationals of States who possess the qualifications required for appointment to the highest judicial offices in their respective States or who are jurists of recognised competence. This provision should be read with Article 4(1) which proves that each state may nominate one candidate having the qualifications prescribed in Article 3 of this Protocol.

[88] A Moyo 'Defending human rights and the rule of law by the SADC Tribunal: Campbell and beyond' (2009) 9 *African Human Rights Law Journal* 590 at 591.

Tribunal was launched in Windhoek, Namibia.[89] The Tribunal was designed to operate differently from the African Commission on Human and Peoples' Rights (African Commission) in that that it assumed the powers of judicial body. It did not operate as a quasi-judicial body.[90]

3.2.1 The jurisdiction of the Tribunal

Jurisdiction is generally understood as the power or competency of a court to hear a dispute and decide disputes. It refers to a court's power to compel one to appear in a distant forum to defend or prosecute a lawsuit.[91] It is defined as 'the right by which judges exercise their power of hearing and determining causes and of doing justice in matters of complaint which also includes not only the authority to pronounce the law on the matter before them, but also to pass upon and settle by its judgments the rights of the parties, touching the subject-matter in controversy, and to enforce such sentence.'[92]

In so far as jurisdiction of the regional judicial bodies is concerned, the matters here are international disputes. 'An international dispute is defined as a disagreement concerning a matter of fact, law, or policy in which a claim or assertion of one party is met with refusal, counterclaim, or denial by another, and in which these parties involve governments, organisations, legal persons, or private persons.'[93](emphasis added). As the sub-regional court in the SADC, the SADC Tribunal also has jurisdiction to entertain matters from the SADC Community. Primarily, the Tribunal had jurisdiction to hear the disputes between: SADC Member States; natural or legal persons and Member States;[94] Member States and the SADC;[95] natural or legal persons and the SADC;[96] and SADC employees and the SADC.[97]

The Protocol on the Tribunal (2000) allows the Tribunal to hear and adjudicate on disputes and all applications submitted to it in accordance with the SADC Treaty and the Protocol. Such matter which pertain the interpretation, application or which seeks clarity on the validity of

[89] Jonas (n 10) 296.
[90] Moyo (n 88) 596.
[91] Sizwe Snail Ka Mtuze 'Jurisdiction in Electronic Trans-Border Contracts' The Legal Practise Counsel (Midrand). Available at https://www.lawsoc.co.za/default.asp?sl=&id=1888 (Accessed 07 September 2021).
[92] JW Walsh 'The true meaning of the term 'jurisdiction' (April, 1901) at 347. Available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6021&context=penn_law_review (Accessed 15 September 2021).
[93] KJ Alter & L Hooghe 'Regional Dispute Settlement Systems' in TA Börzel & T Risse (eds) *Oxford Handbook of Comparative Regionalism* (2016) at 539.
[94] Article 15(1) of the 2000 Protocol.
[95] Article 17 of the 2000 Protocol.
[96] Article 18 of the 2000 Protocol.
[97] Article 19 of the 2000 Protocol.

actions of the institutions of the SADC. It also entertains 'all matters specifically provided for in any other agreement that Member States may conclude among themselves or within the SADC and which confer jurisdiction on the Tribunal.'[98] Interestingly, according to the treaty and the 2000 Protocol, the individuals are free from proving harm before approaching the Tribunal. The only requirement to be met is that of exhausting the internal remedies before seeking relief from the Tribunal.[99]

Initially, the Tribunal entertained complaints from individuals on numerous occasions. The Tribunal heard employment, commercial and human rights cases.[100] This power was, however, restricted by the SADC Summit following the challenges to the land grabs in Zimbabwe. The downfall of the Tribunal followed when the Zimbabwean Government suffered a defeat in the famous *Campbell case*. This is discussed below.

3.2.2 The downfall of the SADC Tribunal

The disintegration of the SADC Tribunal started after the case of *Mike Campbell v The Republic of Zimbabwe*. This case has its roots from the Former President Robert Mugabe's administration strategy of land distribution programme. The programme was a way of redressing the socio-economic injustices brought by colonialism to the Zimbabwean natives. In the beginning, the reform programme was based on the willing buyer- willing seller approach.[101] In 2006, however, the government of Zimbabwe started the land distribution programme in the form of a robust expropriation without compensation. The property clause[102] in the Constitution of Zimbambwe was then revised to suit the purposes of the of the expropriation of land without compensation, the aim of the reform programme.[103]

---

[98] Asmelash (n 80) 6. See also Articles 16(1) and 32 of the SADC Treaty and also Article 14 of the Protocol.
[99] Asmelash (n 80) 6.
[100] M Hulse 'Silencing a Supranational Court: The Rise and Fall of the SADC Tribunal' E-International Relations, 25 October 2012 at 1. Available at https://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/ (Accessed 17 September 2021).
[101] GJ Naldi 'Mike Campbell (Pvt) Ltd et al v The Republic of Zimbabwe: Zimbabwe's Land Reform Programme Held in Breach of the SADC Treaty' (2009) 53(2) *Journal of African Law* 305 at 307.
[102] Section 16 of the Constitution of Republic of Zimbabwe Amendment (No. 16) Act, 2000.
[103] Section 16B of the Constitution of Republic of Zimbabwe Amendment (No.17) Act, 2005. This section provides that… "(2) Notwithstanding anything contained in this *Chapter* (a) all agricultural land (i) that was identified on or before the 8th July 2005, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act…being agricultural land required for resettlement purposes; or (ii) that is identified after the 8th July 2005, but before the appointed day, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [*Chapter 20:10*], being agricultural land required for resettlement purposes; or (iii) that is identified in terms of this section by the acquiring authority after the appointed day in the *Gazette* or *Gazette Extraordinary* for whatever purpose, including, but not limited to A. settlement for agricultural or other purposes; or B. the purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or C. the relocation of persons dispossessed in consequence of the utilization of the land referred to in subparagraph A or B; is acquired by and vested in the State with full title therein with effect from

The Campbell case

In terms of section 16B of the Zimbabwean Constitution Amendment (No. 17) Act, 2005, no lawsuit could be entertained by the courts of Zimbambwe which relates to the section.[104] This clearly was the aim of the Government to silence the white minority landowners who were going to challenge the deprivation of their property by the Government. As such the land-owners could not challenge the provisions of section 16B in the Zimbabwean courts. This is confirmed by the Zimbabwean Supreme Court in *Mike Campbell (Pvt) Ltd & Another v Minister of National Security Responsible for Land, Land Reform and Resettlement*.[105] In other words the Zimbabwean Government strategy to deny landowners access to justice in the domestic courts was a success.

Since, this land reform was inevitably directed at taking back the land from the white landowners, the minority whites were going to be victims of land deprivation. A number of white farmers were affected by this land reform programme as the program meant that their farms were going to be expropriated. However, they still had another channel to challenge the Zimbabwean Government, the SADC Tribunal. Being one of the white farmers, Mike Campbell was going to be one of the affected farmers, having bought his farm after the Independence in 1980. Subsequently and not surprising, the Mike Campbell (Pvt) Limited and William Michael Campbell case concerned an application filed to the SADC Tribunal, challenging the forced land acquisition without compensation by the Zimbabwean Government.

In line with Article 30 of the Protocol to the Tribunal read in conjunction with Rule 70 of the Rules, other white farmers whose property was also subject to expropriation joined the proceedings. This article allows natural persons, entities or states to apply to be joined as parties if they have legal interests in a dispute. The applicants challenged the unlawful land acquisition programme under international law customary, African Charter on Human and People's Rights and the SADC Treaty.[106]

---

the appointed day or in the case of land referred to in subparagraph (iii) with effect from the date it is identified in the manner specified in that paragraph; and (b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired."

[104] Section 16B (3) of the Zimbabwean Constitution of 2005.

[105] SC 49/07 at paras 28-29.

[106] B Freeth 'The Campbell case: Zimbabwean landmark farm test case time line' Mike Campbell Foundation, 15 February, 2018 at 3. Available at https://docs.house.gov/meetings/FA/FA16/20180228/106914/HHRG-115-FA16-20180228-SD001.pdf. (Accessed 18 September 2021).

Due to the urgency of the matter, the applicants also applied for interim order to restrain the Zimbabwean Government from implementing the expropriation clause and from removing them from their agricultural lands, pending finalisation of the matter before the Tribunal, which the Tribunal granted.[107] On the application, it was submitted *inter alia* that:

> the lands belonging to the applicants which have been compulsory acquired by the Government under the reform program were illegally acquired since the Minister who carried out the compulsory acquisition failed to establish that he applied reasonable and objective criteria in order to satisfy himself that the lands to be acquired were reasonably necessary for resettlement purposes in line with the land reform programme; the applicants were denied access to the courts to challenge the legality of the compulsory acquisition of their lands; and that the applicants were denied compensation in respect of the lands compulsorily acquired from them.[108]

The applicants thus sought an order declaring that the Government of Zimbabwe (The Respondent in the matter) acted contrary to its obligations under the SADC Treaty by implementing the compulsory land acquisition. In opposing the matter, the Respondent Government alleged that the Tribunal lacked jurisdiction to hear the matter.[109] The Respondent raised and argued, *inter alia,* that the Tribunal court not hear the matter as it had no jurisdiction on human rights matters. It suggested that the court could only hear matters if there is, in fact, a Protocol adopted by the SADC to that effect.[110] Perhaps, this argument was an invite and opportunity for the Tribunal to clarify its jurisdiction on human rights matters, which it did.

In determining jurisdiction, the Tribunal referred to the provisions of the Protocol on the Tribunal (2000). It referred to article 15 which allows the Tribunal to hear disputes between States, and between natural and legal persons and States provided that the person has exhausted all available local remedies or unless is unable to proceed under the domestic jurisdiction of such State.[111] The Tribunal remarked that the applicants sought remedy in the Zimbabwean local courts, but were unsuccessful because Amendment 17 excluded jurisdiction of the local court to hear matters pertaining the acquisition of lands, by the state for the purposes of the amendment.[112]

---

[107] B Chigara 'Introductory Note to Southern African Development Community (SADC) Tribunal - Mike Campbell (PVT) Ltd and Others v. Republic of Zimbabwe' (2009) 48(3) *International Legal Materials* 530 at 532.
[108] Chigara (n 107) 537.
[109] Chigara (n 107) 537.
[110] Chigara (n 107) 539. See *Campbell* (n 10) at 14.
[111] *Campbell* (n 10) at 18.
[112] *Campbell* (n 10) at 21.

Clearly, from the perspective of the Zimbabwean local courts, matters relating to the land acquisition as per Amendment 17 fell within the scope of the legislature, and not that of a judicial body.[113] But what else can an individual landowner do to protect their [human] property rights? After all the opposition, here is the same government who passed the law, legalising arbitrary deprivation of property without compensation. This gives more reasons to advance for the access to the regional judicial body for the victims, against arrogant and government who refuse to obey human rights.

The Tribunal established its human rights jurisdiction to hear the matter on article 4(c) of the SADC Treaty which set out, *inter alia,* the principles of human rights human rights, democracy and the rule of law. It held that that the Zimbabwean Government cannot rely on its national laws to exclude the applicability of the SADC Treaty provisions.[114] It thus correctly found human rights jurisdiction.[115] Having found jurisdiction, the Tribunal went on to state that the applicants had been denied their right of access to courts.[116] It held that 'the applicants have been deprived of their agricultural lands without having had the right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law, and we consequently hold that the Respondent has acted in breach of Article 4 (c) of the Treaty.'[117]

The Tribunal expressed the view that the Zimbabwean land reform programme was not *per se* unlawful, however, the procedure that was adopted was arbitrary, unreasonable and lacked objectivity.[118] It observed that the programme was discriminatory against the minority whites and allowing such would be defeating the rule of law principle enshrined in the SADC Treaty.[119] In holding against the Respondent Government, the Tribunal quoted with approval the Zimbabwean Supreme Court in *Commercial Farmers Union v Minister of Lands (Commercial Farmers case)*[120] where it was stated that:

[113] See the Zimbabwe Supreme Court ruling in Mike Campbell (Pty) Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement (SC 49/07) (*Zimbabwe Supreme Court Judgement*).
[114] *Campbell case* (n 10) at 25. The Tribunal based its holding on Article 27 of the Vienna Convention on the Law of Treaties which stipulate that: "A party may not invoke provisions of its own internal law as justification for failure to carry out an international agreement."
[115] *Campbell case* (n 10) 25.
[116] *Campbell case* (n 10) 34.
[117] *Campbell case* (n 10) 41.
[118] *Campbell case* (n 10) 54.
[119] *Campbell case* (n 10) 54
[120] 2001 2 SA 925 (ZSC).

> We are not entirely convinced that the expropriation of white farmers, if it is done lawfully and fair compensation is paid, can be said to be discriminatory. But there can be no doubt that it is unfair discrimination…to award the spoils of expropriation primarily to ruling party adherents.[121]

The attitude of the Tribunal was that the expropriated of lands ought to be compensated. In a unanimous judgement, the Tribunal ordered that the Zimbabwean Government to take all the necessary measures to protect the possession, occupation and ownership of the white farmers, and ensure that the Government refrain from interfering with the peaceful enjoyment of the property by the applicants.[122] It further ordered compensation for those already been affected by the expropriation in terms of Amendment 17.[123] It is clear from the events subsequent to this ruling that, the *Campbell case* was nothing but the beginning of the war. To the respondent Government, this ruling posed a huge threat forcing it to surrender its power.

The respondent Government intentionally ignored the ruling of the Tribunal and continued to implement its arbitrary land programme. Due to this continued disregard of the Tribunal ruling, the applicants submitted a new application to the Tribunal to declare that Zimbabwe was in contempt.[124] At this instance, the arrogant Mugabe administration declared, in a letter directed to the Tribunal, that it will no longer submit to the jurisdiction of the Tribunal.[125] This time around, the Tribunal not only found in favour of the applicants but also referred the matter to the SADC Summit in terms of article 32(5) of the Protocol in terms of which the Summit would take an appropriate action against Zimbabwe's contempt.[126]

As it is apparent below, referring the enforcement to the group of impartial politicians was the worst option the Tribunal had. But what was the Tribunal supposed to do? After all, the directive comes from the Protocol and the Tribunal was only following the due process. Or perhaps, a praise should go to the Mugabe administration for the calculated move to crush the powers of and collapsing the SADC Tribunal. Indeed, Mugabe's political game was a success.

---

[121] *Commercial Farmers case* (n 120) at paras 9.
[122] *Commercial Farmers case* (n 120) 58 – 59.
[123] *Commercial Farmers case* (n 120) 58 – 59.
[124] Fick & Others v Republic of Zimbabwe SADC (T) 01/2010 (*Fick Judgement*).
[125] PN Ndlovu '*Campbell v Republic of Zimbabwe*: A moment of truth for the SADC Tribunal' (2011) 1 *SADC Law Journal* 63 at 76. The former President Mugabe reportedly made the following statement: "Some farmers went to the SADC Tribunal in Namibia, but that's nonsense, absolute nonsense, no one will follow that ... We have courts here in this country that can determine the rights of people. Our land issues are not subject to the SADC Tribunal." See Cris Chinaka 'Mugabe says Zimbabwe land seizures will continue' Mail & Guardian (Johannesburg) 28 February 2009. Available at https://mg.co.za/article/2009-02-28-mugabe-says-zimbabwe-land-seizures-will-continue/. (Accessed 18 September 2021).
[126] Chinaka (n 125).

But, the results were that of the *Amoco Cadiz incident* - they were catastrophic, at least from the rule of law and human rights perspectives.

The outcomes of the Campbell ruling

When the Mugabe administration realised that the rule of law was a blockade to its plan of expropriating lands of the minority white farmers without compensation, it shifted the focus of challenging the jurisdiction of the Tribunal and challenged its legality status.[127] The then Minister of Justice, Chinamasa, then issued a memorandum alleging that the Tribunal was ill-constituted and therefore its rulings were null and void. The communication further declared that Zimbabwe will not appear before such an illegitimate institution.[128] Zimbabwe's position was that the Protocol ratification requirement was never complied with for the Tribunal to operate.[129]

It will be remembered that since the adoption of the Protocol in 2000 and the amendment of the 2001 SADC Treaty, the Protocol became the integral part of the SADC Treaty, which required no further ratification.[130] Zimbabwe also raised the argument the 2001 Amendment of the SADC Treaty was never operational, because the ratification requirement was never met.[131] The Zimbabwean Government continued its agenda to destroy the SADC Tribunal and it did successfully so. The Mugabe regime decided not to fight the 'monster Tribunal' alone, but lobbied SADC Members to ensure the end of the Tribunal.[132]

The SADC member states joined the campaign questioning the legitimacy of the 'monster Tribunal' which seemed to force them to give away their sovereignty. Subsequently, in August 2010 the Summit called for the review of the role, functions and terms of reference of the Tribunal.[133] The action against Zimbabwe was deferred pending the review. The outcomes of the review revealed that the Tribunal was properly constituted in terms of international law and that the Tribunal had jurisdiction to human rights matters.[134]

Having received the report of the independent review, the Summit nonetheless ordered the SADC Ministers of Justice and Attorneys-General to begin with process reviewing to amend

[127] Asmelash (n 80) 15.
[128] Asmelash (n 80).
[129] Asmelash (n 80) 16.
[130] Asmelash (n 80).
[131] Asmelash (n 80) 17.
[132] A Shivamba 'The demise of a legitimate southern African regional court' Southern Africa Litigation Centre (SALC) Policy Brief No. 6 of 2019 at 3.
[133] Shivamba (n 132).
[134] Shivamba (n 132).

the Protocol.[135] The Summit did not reappoint Members of the Tribunal whose term of office expired; it decided not to replace Members of the Tribunal whose term of office was set to expire. It placed a suspension on the operations of new cases by the Tribunal until the SADC Protocol on the Tribunal had been reviewed and approved.[136]

3.3 The new Protocol on the Tribunal

Having suspended the Tribunal, the SADC Summit adopted a new Protocol to the Tribunal in August, 2014.[137] The new Protocol changed the original jurisdiction of the Tribunal in that, the new Protocol limits cases that can be heard by the Tribunal to interstates disputes.[138] Article 33 of the new Protocol states that 'the Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between member States.' In other words, the new Protocol deviates from the position of the previous treaty to assess validity and correct application of the community law.[139] Also, the Tribunal will have jurisdiction on matters relating to the SADC Treaty and Protocols,[140] thus limiting the wide scope in Article 14 of the 2000 Protocol.

In terms of the new Protocol SADC institutions, natural and legal persons are not allowed to access the Tribunal and enforce their rights against states.[141] Not all members signed the Protocol thus far. In terms of article 53 of the new Protocol, the Protocol will only become operational thirty days after the deposit of instruments of ratification by two-thirds of the Member States. What is also new in the 2014 Protocol is that it allows the Member states to withdraw from the Protocol.[142] This is somewhat confusing, because the new Protocol on the Tribunal still form an integral part of the SADC Treaty.[143] Unlike other Protocols, the Protocol on the Tribunal is one of its own kind in that a state party to the SADC Treaty is automatically bound by the Protocol.[144]

---

[135] Asmelash (n 80) 17.
[136] Asmelash (n 80) 17.
[137] E Tino 'Southern Africa Development Community and its 'new' Tribunal: Some remarks' in T Hartzenberg and G Erasmus *Monitoring Regional Integration Yearbook* 2015/2016 (2016) at 111.
[138] Tino (n 137) 115.
[139] As above.
[140] Article 33 of the new Protocol.
[141] Article 33.
[142] Article 50 of the new Protocol.
[143] Article 2 of the new Protocol.
[144] G Erasmus 'The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law' Tralac (Stellenbosch) 21 January 2015) Working Paper at 12. Available at https://www.tralac.org/documents/publications/working-papers/wp2015/242-us15wp012015-erasmus-new-protocol-sadc-tribunal-20150123-fin/file.html (Accessed 22 September 2021).

A causal connection can be easily drawn between Mugabe's campaign to destroy the power of the Tribunal and the adoption new amending Protocol. The amendment is simple aimed at denying individual access so that they cannot easily challenge states on their rights, even when the local remedies are not effective. It is the plan for the SADC states to go unchallenged and unpunished for human rights violations. Individual access to the African Court is a difficult one and regional judicial body with human rights jurisdiction provide easy access to individuals, due to its proximity, hence the backlash by human rights violators. Indeed, the existence of an independent regional court is a threat to non-law abiding states.

This 2014 Protocol is nothing but a legal document intended to certify SADC as a lawless region, where political leaders will engage in human rights violations, fearlessly. Since the fall of the original SADC Tribunal, there is no properly constituted dispute settlement mechanism in the SADC region. What was introduced, instead, was the SADC Administrative Tribunal (SADCAT), which is responsible for resolving disputes between the SADC and its employees. The new Tribunal will only become operative when the two-thirds majority requirement has been met. The backlash of the SADC regional court is worrisome, because RECs judicial bodies play a very crucial role in promoting development and fostering integration in a REC.[145] In the following section, I focus on the significance of these regional courts in integration.

3.4 The role of regional courts in regional integration

RECs judicial bodies usually form part of the institutional framework of the regional treaty. This is intentional for various reasons as will be shown in this section. These regional courts are not different from any other international adjudicative bodies, but fall within the definition of the latter.[146] One would correctly argue that these courts are designed to settle disputes, however, the role of these courts goes beyond settlement of disputes. It is said that the functions of these courts include *inter alia* 'social control, law making, articulating social and political ideals, protecting individual and minority rights, and securing social change.'[147]

Drawing from experiences from various jurisdictions, regional judicial bodies are pillar institutions of a REC that can be a vehicle for to accelerate integration, guard against human rights, ensure the supremacy of the law, forge regional trade relations and promote economic

[145] Tino (n 62) 121.
[146] Oppong (n 18) 62. See also N Grossman 'Legitimacy and International Adjudicative Bodies' (2009) 41(1) *George Washington International Law Review* 107 at 111.
[147] LR Helfer and A Slaughter 'Toward a Theory of Effective Supranational Adjudication' (1997) 107(2) *Yale Law Journal* 273 at 282.

development of the region.[148] It has been conceded that although regional integration courts are primarily concerned with the interpretation of the laws and rules enabling the proper functioning of the regional organisation, 'they (regional courts) can be and are used in order to modify or protect national rule of law and the constitutional order from the outside (from the regional integration aspect rather than domestically) and the extent that this can promote a uniform interpretation and application of human rights.'[149]

It must be reiterated that regional economic integration involves sharing technology, laws reducing trade barriers, and rules relating to promotion of market access by and for a group of countries in a particular region, leading to a voluminous number of transactions taking place in that region.[150] This means that an independent judicial forum of resolving disputes is significant. It is of course, acknowledged that the diplomatic channels are not useless, but an independent judicial body is more powerful in upholding the rule of law.

Perhaps the most important role played by sub-regional judicial bodies is interpretation of the law. In this regard, it is worth quoting Voeten who states as follows:

> Regional courts can play an important role in ensuring a uniform interpretation of regional agreements across member states. All courts engage in interpretational activities of some sort. At a minimum, courts must make a judgment on how a particular case fits the law. Yet, treaties are always incomplete or imprecise. Consequently, courts frequently make determinations about precisely how a treaty should be interpreted. These determinations do not necessarily match the desires of the states that created the treaty. Such interpretations can have broad impact, especially if other courts or panels rely on them.[151]

The observation made by the learned author above raises two important aspects. The first one is general and primary function of the courts to give meaning to [regional] laws in concrete situations. The second aspect relates to the function of the courts as law makers. Of course, the concept of judicial precedence is not known in international law, but the court's own ruling has a persuasive value. International courts may refer to their own rulings, thereby contributing in the development of its jurisprudence. Voeten further adds that the importance of such

[148] Oppong (n 18) 62.
[149] KN Metcalf & IF Papageorgiou 'Regional courts as judicial brakes?' (2017) 10(2) *Baltic Journal of Law & Politics* 154 at 156.
[150] E Voeten 'Regional Judicial Institutions and Economic Cooperation: Lessons for Asia?' (November, 2010) Working Papers on Regional Economic Integration No.65, Asian Development Bank at 2. Available at https://aric.adb.org/pdf/workingpaper/WP65_Voeten_Regional_Judicial_Institutions.pdf.(Accessed21 September 2021).
[151] As above.

jurisprudence is that it demonstrates the consistency in the law and at the same time proves impartiality of the judges to the losing party.[152]

Regional courts also, play a vital role in ensuring that state comply with laws of the community of laws.[153] For some regions, institutional arrangements are made to ensure that member states do comply with the community law.[154] Courts provide a channel not only for states, but for individuals and private entities to hold member states, that fail to comply with the treaty commitments, accountable. This also guarantees transparency, rule of law and accountability in the REC. This is especially relevant in a REC like SADC that is founded on the principles human rights, democracy and rule of law.

The establishment of a judicial forum in a REC guarantees the implementation of the treaty commitments and policies under the treaty. In this regard, Voeten point out that 'the credibility of a commitment to regional integration is only increased if the delegation to the regional court is meaningful in the sense that court is independent, has compulsory jurisdiction, is easily accessible for potential disputants, imposes meaningful penalties on non-compliance, and is costly to withdraw from.'[155] Thus far, it is clear regional economic courts do more than resolving the disputes. The observation of the principles of rule of law also ensures that the is properly used as a tool to promote the interest of the member states in a REC.[156]

The importance of sub-regional courts in regional integration can be further explained through the principles of accountability and separation of powers. This principle of separation of powers dictates that state power ought not be centralised [in the government], but should be shared amongst the three [arms of the government], namely: the legislature, executive and the judiciary yet allowing checks and balances.

---

[152] Voeten (n 150) 4.

[153] On the role played by the subregionalcourts in economic integration, the following is submitted: "It is the supreme authority on all matters of community law and in this capacity is required to decide matters of constitutional law, administrative law, social law and economic law in matters brought directly before it or on application from national courts. In its practices and procedures, it draws on continental models; in developing the substantive law it draws on principles and traditions from all member states." See RC Kefa 'The role of the East Africa Court of Justice in regional integration; emerging jurisprudence and the way forward' LLM Thesis, University of Nairobi, 2006 at 33. (On file with the author).

[154] Voeten (n 150) 5.

[155]Voeten (n 150) 7. It is also submitted that 'regional courts present a platform for addressing gaps in the regulatory framework governing regional integration.' See A Ordor 'Advancing the Role of Regional Courts for Regional Integration in Africa: A Study of the East African Court of Justice and the ECOWAS Court of Justice' (2018) 45(2) *The African Review* 63 at 64.

[156] Kefa (n 153) 37. See also MR Phooko 'No longer in suspense: Clarifying the human rights jurisdiction of the SADC Tribunal' (2015) 18(3) *Potchefstroom Electronic Law Journal* 531 at 531.

The aim of the separation of powers and checks and balances is to ensure that power is not abused [by the government], but also acknowledges and respects the different functions assigned to the different arms of government. It ensures that there is oversight on the functions of each arm by one another. In regional integration arrangements, the design of institutional framework give reasons to have separation of powers as a form of accountability. On the applicability of this principle at the regional level, Nyirongo correctly make the following recommendation:

> As with nations, a community requires separation of powers between its various organs. The functions of organs can be divided into three categories; namely the executive function, the legislative function and the judicial function. In order to ensure transparency and accountability and to avoid the abuse of powers, there is a need to distinguish between the organs that are responsible for each function. Therefore, an organ such as the SADC Summit should not be responsible for developing community law and enforcing it as well. It is recommended that this framework be revised.[157]

Indeed, such mechanism can ensure that there is enhanced transparency in the operations of the community. In that way, regional courts are able to guard against the possibility of member states placing their political interest at the peril of economic cooperation and human rights. Saurombe also point us to the SADC Tribunal and suggest that it can pave the way for harmonisation of business laws.[158] What is apparent thus far is that the regional community courts have a function embedded to their establishing treaties. Their function aligns with the commitment of a REC, thereby providing a good instrument in promoting regional integration.

Some scholars argue that even though the SADC Tribunal has failed before reaching its full potential to operate, its failure can be contrasted with the East Africa Court of Justice which arguably showed success.[159] This suggest that the effectiveness of regional courts may be influenced by various factors. The obvious one is the political dynamics in the REC. Where political power is supreme, the REC court can hardly succeed. Again, this can be seen in the SADC region where political heads united to destroy the Tribunal, because their friend never wanted to comply and account for breaching the SADC community law and SADC commitments.

---

[157] Nyirongo (n 24) 54.

[158] A Saurombe 'The role of SADC institutions in implementing SADC treaty provisions dealing with regional integration' (2012) 15(2) *Potchefstroom Electronic Law Journal* 454 at 472.

[159] C Fanenbruck & L Meißner 'Supranational Courts as Engines for Regional Integration? A Comparative Study of the Southern African Development Community Tribunal, the European Union Court of Justice, and the Andean Court of Justice' KFG Working Paper Series, No. 66, November 2015 at 7. Available at https://www.polsoz.fu-berlin.de/en/v/transformeurope/publications/working_paper/wp/wp66/WP-66-Fanenbruck_Meissner_WEB.pdf. (Accessed 21 September 2021).

3.5 Conclusion

In summary, it is clear in this chapter that the SADC Tribunal was formed under the SADC Treaty as one of the major institutions of the SADC and as dispute settlement mechanism in the SADC. Despite the clear commitment of the SADC to have the Tribunal that will attract investors, it is unfortunate that the Tribunal had a very short lifespan. Following the land grabs under the former President Mugabe administration in Zimbabwe, and after the country suffered defeat in the *Campbell case*, the threatened SADC Summit suspended the Tribunal. The SADC states adopted the new 2014 Protocol to escape litigation brought by individuals. The Protocol limits the jurisdiction of the Tribunal to interstate disputes.

The Tribunal's power was intentionally crushed to ensure that the power of the member states is supreme over rule of law. The main concern in the *Campbell case* being the Tribunal's jurisdiction on human rights matters. Let alone that human rights jurisdiction can be established from the SADC Treaty, it is clear from the findings above that the SADC political heads, when suspending the Tribunal, paid less attention to the role of the Tribunal in the economic cooperation of the region. They only concerned themselves with 'monster' inside the house. However, as it is apparent above the regional economic courts, including the SADC Tribunal play a vital role in promoting regional integration.

Regional community courts are a tool for, *inter alia,* settling disputes due to increased business transactions; to ensure compliance and enforcement of law; and to develop the jurisprudence of the REC. In line with this reasoning, it is submitted that SADC ought to restore the original powers of the Tribunal and disregard the 2014 Protocol. In any case, the Protocol has not yet been ratified by the two-thirds majority of the member states. Also, the exclusion of human rights jurisdiction and access of individuals cause confusion and contradict the preamble of the SADC Treaty. The SADC tries to divorce human rights from regional integration, which is impossible. However, the issue of the human rights jurisdiction and access of individuals is discussed separately in the following chapter.

CHAPTER 4

HUMAN RIGHTS AND ACCESS TO JUSTICE IN THE SADC

4.1 Introduction

In the previous chapters, it is noted that one of the main contentions by the Republic of Zimbabwe in the *Campbell case* was that the SADC Tribunal does not have jurisdiction on human rights matters. The new 2014 Protocol also excludes human rights jurisdiction by the Tribunal. Individuals and legal entities cannot bring matters before the Tribunal, only interstate disputes that can be heard by the Tribunal. It is, however, very hard to imagine and even reconcile the separation of human rights and the process of integration in the SADC region.

The exclusion of access of the individuals and entities to the court raises a concern as common market involve private actors. Initially, before the disbandment, the SADC Tribunal, could entertain commercial, labour and human rights disputes. It is against this backdrop that this chapter focuses on the marriage between the process of integration in Africa and human rights. It explores the individual's right of access to justice in the regional economic community courts. The study will explore few important cases submitted by civil societies in South Africa and in Tanzania in the call for the revival of the SADC Tribunal. Comparative analysis will be also made to other African RECs courts, in particular, the ECOWAS Court.

Whereas, it appears that there is a backlash against these courts on human rights it will argued, in this chapter, that the SADC Tribunal restore its jurisdiction on human rights and individual access. It will be argued that the SADC Tribunal has jurisdiction to hear human rights matters and that its original jurisdiction should be reinstated. It will be also shown that there is no need for the SADC to adopt a separate human rights Protocol to establish human rights jurisdiction but the Preamble of the SADC Treaty and the Treaty principles establish that jurisdiction.

4.2 The marriage between regional integration and human rights

On the face of it, there appears to be no relationship or whatsoever between the establishment of regional economic communities and the promotion and protection of human rights.[160] One would convincingly argue that the two are separate and that integration is only concerned with economic cooperation. Indeed, Ruppel submit that the regional had not incorporated human rights in their systems of integration except for the European Union in its 2000 Charter of

[160] Ruppel 'Regional economic communities and human rights in East and southern Africa' in Bosl & Diescho (n 14) 277.

Fundamental Rights of the European Union.[161] The learned author asserts that the African regional integration commitment 'to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law' does not make African integration intertwined with human rights.[162] The author incorrectly suggests that the fact that that there is no inclusion of human rights in the regional treaty in other regions, other than in the EU, is an indication that there is no nexus between integration and human rights.[163] It is also notable that the author incorrectly restrict human rights, insofar as regional integration is concerned, to the so-called economic rights.

However, the protection of human rights and good governance play a crucial role in regional integration, and most human rights standards are normally recognised by the REC treaties. There are various for the incorporation of human rights into the REC regime. First, the member states of the RECs have bound themselves to observe human rights standards at the regional and international levels.[164] In the African RECs, most of the REC-establishing treaties make an express reference to human rights standards, whether in the objectives or as foundational principles.[165]

It is said that one other way in which human rights are intertwined with RECs regimes is that human rights and good governance play an essential role in economic development.[166] Further, Nwauche correctly point out as follows:

> Since regional economic integration is about the development of the people of the region concerned, it is about human rights in the process of integration and in the potential results of integration. It is, therefore, not completely true that human rights is a subject that regional integration must address before it becomes part of the process. From the outset, human rights are part of the integration process, since integration is likely to be aimed at satisfying at least the socio-economic rights of the people of the region.…Furthermore, the abolition of national restrictions on the movement of people, goods, services and capital, in whatever stage of integration, is about the rights of the people. If the people of a region have a regional right of residence instead of a national right of residence, their freedom of movement,

[161] AM El-Agraa 'Economic Rights and Regional Integration: Considering the EU and ASEAN Charters within the Perspective of Global Regional Integration' (2009) 24(4) *Journal of Economic Integration* 634 at 639.
[162] El-Agraa (n 161) 639.
[163] El-Agraa (n 161) 641. The author asserts that "economic integration, as a field of economic inquiry, has nothing to do with economic rights: economic rights are peculiar/particular to the EU and the EU happens to be a scheme of economic integration, albeit the most significant and influential of such schemes." At 642.
[164] As above. See also RM Phooko 'The SADC tribunal: its jurisdiction, enforcement of its judgments and the sovereignty of its member states' LLD Thesis, University of South Africa, 2016 at 83.
[165] SF Musungu 'Economic integration and human rights in Africa: A comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal* 88 at 92.
[166] In this regard Ruppel explains good governance to mean "an effective democratic form of government relying on broad public engagement (participation), accountability (control of power) and transparency (rationality)." Ruppel (n 14) 278.

> assembly and association are enhanced. Every decision taken towards enhancing the integrative process is likely to impact the human rights of the people of the region.[167]

Notable in this regard, it is untenable that economic development can run without human rights protection. As apparent from the comment above, human rights either inform the integration process and development or integration impact on human rights.[168] This must be true, especially in relation to socio-economic rights. For REC treaties that refer to certain human rights instrument, there is no dispute that such a REC recognise human rights. However, another question that may be asked by a concerned scholar is whether the human rights, as referred, in the RECs instruments relates only to development and socio-economic rights only or to human rights generally.

4.2.1 Global and African regional protection of human rights

At the global level, the instruments protecting human rights include, but are not limited to: The Universal Declaration of Human Rights,1948 (Universal Declaration); the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of all Forms of Racial Discrimination (CERD) and Convention on the Elimination of all Forms of Discrimination Against Women(CEDAW). In the African regional level, the main document that was adopted to promote and protect human rights is the African Charter on Human and People's Rights, 1981. (The Banjul Charter).[169]

On the African economic integration, the African Economic Community Treaty of Abuja of 1991(Abuja Treaty) must be the point of departure. Article 3 of the Abuja Treaty recognise the promotion and protection of human and peoples' rights in accordance with the provisions of the Banjul Charter. This provision must be read with article 15 which provides that everyone has a right to work under equitable and satisfactory conditions and to receive equal pay for equal work. There are also other provisions implicitly recognising the protection and promotion of human rights in the Treaty.

---

[167] ES Nwauche 'Regional Economic Communities and Human Rights in West Africa and the African Arabic Countries' in A Bosl & J Diescho (eds) *Human rights in Africa: Legal perspectives in their protection and promotion* (2009) at 319.

[168] As Ruppel puts it "this interconnection can be seen as a two-way relationship insofar as economic development is obliged to respect human rights in a democratic society. Conversely, human rights can be given more effect through economic growth, as one outcome of economic growth is the increasing availability of resources, resulting in the reduction of poverty and a higher standard of living." Ruppel (n 14) 279. See also AJ Ali 'The admissibility of subregional courts' decisions before the African Commission or African Court' (2012) 6(2) *Mizan Law Review* 241 at 242.

[169] Musungu (n 165) 89.

The Abuja Treaty, for instance, obliges the member states to take measures to harmonise labour laws[170] and in the protection of neglect, abuse and exploitation of children.[171] Thus, it can be argued that to a certain extent, the Abuja Treaty does incorporate workers' rights.[172]As noted above, some RECs are framed within the spirit and purport of the Banjul Charter. As it is clear, the Revised ECOWAS Treaty of 1993 declares *inter alia* the 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights' as the foundational principle of the ECOWAS.

4.2.2 Human rights protection in the SADC

Under, the SADC Treaty, there is no provision or reference to a particular human right, nor there is a Protocol on human rights in the SADC region. However, in the Preamble of the of the Treaty the SADC member states do appreciate the involvement of the SADC citizens in the economic development of the region. The SADC states not only recognise the recognise the human rights of SADC people but declare their commitment to observe and protect them.[173] According to article 4, the SADC states are bound to respect principles of democracy, human rights and rule of law. Again, the SADC commit itself to observe human rights norms.

Another implicit inclusion of human rights standards in various legal instruments of the SADC which include: The SADC Protocol on Gender and Development of 2008, as revised in 2016; the Charter of Fundamental Social Rights in the SADC of 2003;[174] and the non-binding Code on Social Security in the SADC. The Protocol on Gender and Development seeks to promote and protect the rights of women and girls, to fight discrimination against women and ensure women empowerment through harmonisation of SADC laws and enactment of gender responsive legal instrument.

In the end, it is clear that various RECs do incorporate human rights standards in their regional legal framework. It is thus submitted that there exist a strong and inseparable relationship between human rights norms and regional integration. The two are intertwined, whether

[170] Article 72 (b) of the Abuja Treaty.
[171] Article 72 (c) of the Abuja Treaty.
[172] HJ Richardson 'African Regional Integration and Human Rights: Potential Problems' (1995) Proceedings of the Annual Meeting (American Society of International Law) 89 500 at 502. Available at https://www.jstor.org/stable/25658972. (Accessed 22 November 2021).
[173] See the Preamble of the SADC Treaty.
[174] Article 3(1) of the Charter stipulate that the Charter embodies the recognition by governments, employers and workers in the Region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the Constitution of the ILO, the Philadelphia Declaration and other relevant international instruments. Member States undertake to observe the basic rights referred to in the Charter.

expressly or implicitly. However, whether these rights can be enforced by individuals in the REC court is a separate issue that varies from region to region. The issue depends on whether the legal instruments arrangements of a region permit access to the sub-regional court, and to the extent at which that is permitted. In the SADC region, individual access to enforce human rights in the SADC Tribunal was permitted until the *Campbell case* as noted.

Currently, the 2014 Protocol blocks the enforcement of human rights by individuals and legal entities in the Tribunal. The Tribunal has jurisdiction to entertain interstate disputes only as noted. The issue of denying individual access to enforce human rights in a court of law is pure injustice in a region, like SADC, that is founded on principles of *democracy, human rights and rule of law*. The SADC region must not only recognise human rights, but must also allow its people to challenge human rights violations. Some of the national courts in the SADC have ruled against this denial of justice in the SADC. The following section focuses on individual access to the SADC Tribunal under the 2014 Protocol and the applicable jurisprudence of the national courts.

4.3 Individual access to justice in the SADC: *The Law Society of South Africa* and *Tanganyika Law Society cases*

4.3.1 Access to justice and access to justice of the sub-regional court

The notion of access to justice ensures that states allow and guarantee their citizens the right to have a forum of resolving legal disputes, either a court of law or an alternative dispute resolution body.[175]This is to allow citizens to have remedy for any of their infringed legal rights. Access to justice has been described as an important aspect of the rule of law principle.[176] It requires that a state establish an efficient and independent judicial body to ensure the quality of the justice systems. For these reasons and others access to justice encompasses a lot of aspects and it would be difficult to try and create standard definition.

However, Lima and Gomez define access to justices as follows:

> Access to justice is a fundamental right that must be guaranteed in democratic, participatory, and egalitarian societies. It is the right of all individuals to use the legal tools and mechanisms to protect their

[175] European Union Agency for Fundamental Rights & Council of Europe *Handbook on European law relating to access to justice* (2016) at 16.
[176] As above.

> other rights. There is no access to justice when, for economic, social, or political reasons, people are discriminated against by law and justice systems.[177]

From this view, access to justice is not only an aspect of rule of law, it is also a fundamental right in itself and an instrument to find remedy and protection of other human rights.[178] This right can be found in the international bill of rights,[179] as well as in the regional arrangements[180] and in national constitutions.[181] As a right, access to justice can be exercised by anyone whose legal rights has been violated or at least threatened. It is said that efficient access to justice must also allow individual citizens to protect themselves from abuse of abuse of their fundamental rights.[182]

As it appears from international and regional human rights regimes, individuals are also entitled to this right to approach regional and international courts. But, it must be proved that local remedies have been exhausted before approaching such forums. Thus, this right operates as an exception in the international arena.[183] In the SADC, as already stated above, article 4 (c) of the SADC Treaty play a central role in finding the right of access to courts for the SADC citizens. In terms of this article SADC member states are obliged 'to respect principles of human rights, democracy and the rule of law.' This obligation should be read with the undertaking by SADC states in article 6(1) of the SADC Treaty 'to refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty.'

That access to justice is justified under the said SADC Treaty provisions was confirmed in the famous Campbell case. In finding, the right to access to justice for the applicants under the

---

[177] V Lima & M Gomez 'Access to Justice: Promoting the Legal System as a Human Right' In: W Leal Filho, A Azul, L Brandli, P Özuyar, & T Wall (eds) *Peace, Justice and Strong Institutions,* Springer (2020) at 1.
[178] As above.
[179] The right to access of justice can be found in Article 8 of the UDHR which provides that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Article 2.3 of the ICCPR provides as follows: "(a) any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedies; and that (c) the competent authorities shall enforce such remedies when granted. A similar provision is contained in Article 11 of the ICESCR.
[180] See Articles 6 & 13 of the European Convention on Human Rights (ECHR) of 1950; Article 47 of the EU Charter of Fundamental Rights (EU Charter) of 2000; Articles 5, 6, 7, 26 & 45(c) of the African Charter; and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003.
[181] See inter alia sections 34 & 38 of the Constitution of the Republic of South Africa, 1996.
[182] Lima & Gomez (note 24 above) at 1.
[183] European Union Agency for Fundamental Rights & Council of Europe (n 175) 18. See Article 50 of the African Charter.

SADC Treaty, the Tribunal quoted with approval the sentiments of the Constitutional Court of South Africa in *Zondi v MEC for Traditional and Local Government Affairs and Others (Zondi case)*, where it was stated:[184]

> The right of access to courts is an aspect of the rule of law. And the rule of law is one of the foundational values on which our constitutional democracy has been established. In a constitutional democracy founded on the rule of law, disputes between the state and its subjects, and amongst its subjects themselves, should be adjudicated upon in accordance with law. The more potentially divisive the conflict is, the more important that it be adjudicated upon in court. That is why a constitutional democracy assigns the resolution of disputes to 'a court or, where appropriate, another independent and impartial tribunal or forum'. It is in this context that the right of access to courts guaranteed by section 34 of the Constitution must be understood.[185]

In the *Campbell case*, the Tribunal concluded that the applicants (SADC citizens) had the right to bring their individual complaints to the Tribunal. Also, in the *Zondi case*, the Constitutional Court South Africa held [para. 69] that the Amended Treaty, incorporating the Tribunal Protocol, places an international law obligation on South Africa to ensure that its citizens have access to the Tribunal and that its decisions are enforced. Now that 2014 Protocol on the Tribunal hamstrung individual access to the Tribunal, this constitute the breach of access to justice. This denial of right of access to justice for the SADC citizens is injustice.

Further, having regard to articles 4(c) and 6(1) of the SADC Treaty, it stands to reason that the SADC ought to restore the Tribunal to its original form and allow individual complaints by SADC citizens. Beside the SADC Treaty provisions, the SADC has also showed its commitment to human rights by adopting the SADC Protocol on Gender and Development of 2008 and the Charter of Fundamental Social Rights in the SADC of 2003. The realisation of the rights contained in these instruments depends on the full operation of the SADC Tribunal.[186] It is rather confusing and hard to imagine how these instruments can be enforced by SADC citizens if the SADC Tribunal cannot entertain individual complaints.

Hence, it is submitted that the SADC states should not ratify the 2014 Protocol but rather restore the original Tribunal. This will promote access to justice and human rights protection in the region. It should be also noted that the call for access to the Tribunal by individuals does

[184] *Campbell case* at 34.
[185] 2005 (3) SA 589 (CC) at para 82.
[186] AC Mandlate 'Promoting access to justice in Africa: Key points for advocacy on the Southern African Development Community Tribunal' Global Campus Africa, Policy Briefs (2019) at 5. Available at https://repository.gchumanrights.org/bitstream/handle/20.500.11825/1022/EIUC2019_Africa.pdf?sequence=1&isAllowed=y (Accessed 22 September 2021).

not only relate to natural persons only. Access to justice in the Tribunal also relates to legal entities who are also being denied access to the Tribunal. It should be remembered that regional integration is not about states only but the primary actors in the exchange of goods and services are business entities. Hence, the denial of access to the Tribunal could be a blockade in attracting investors in the SADC region.[187]

To date, calls have been made by Civil Society organisations (CSO) to the SADC to restore the SADC Tribunal but there no changes yet.[188]The SADC national courts have condemned the adoption of the 2014 Tribunal Protocol. These includes: the *Ordem dos Advogados de Moçambique v Republica de Moçambique, Recurso de Apelação*;[189] the *Law Society of South Africa(LSSA) and Others v President of the Republic of South Africa and Others* (*The Law Society of South Africa case*)[190] and the *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania* (*The Tanganyika Law Society case*).[191] For the purposes of section, the focus will be on the last two cases due to their persuasive value in the call for the resuscitation of the SADC Tribunal.

4.3.2 The *Law Society of South Africa case*

At the heart case of this is the right of the citizens of the Republic of South Africa and other SADC members to access of justice at the sub-regional level. In this case, the applicants sought an order confirming the decision of the High Court of Pretoria.[192] The applicants sought an order confirming the constitution invalidity of the conduct of the former President of the Republic of South Africa and his participation in the suspension of the SADC Tribunal in 2011. The Summit suspended the Tribunal by not reappointing judges of the Tribunal whose terms of office lapsed in 2010 nor replacing those whose term of office was set to lapse in 2011.[193]

The applicants challenged the former President's decision to sign the 2014 Tribunal Protocol which restricts the jurisdiction of the SADC Tribunal to hear inter-state matters only, thereby

[187] Rian Geldenhuys 'A new SADC Tribunal?' Trade Law Chambers, (Cape Town) 2012 https://tradelawchambers.com/raxo-what-s-on/116-a-new-sadc-tribunal (Accessed 22 September 2021).
[188] The Coalition for an Effective SADC Tribunal 'Coalition for an effective SADC Tribunal calls on heads of state to reinstating the SADC Tribunal' (14 August 2015). Available at https://www.southernafricalitigationcentre.org/2015/08/15/coalition-for-an-effective-sadc-tribunal-calls-on-heads-of-state-to-reinstating-the-sadc-tribunal/ (Accessed 22 September 2021).
[189] No. 26/2016 decidido pelo Acordão No. 74/2016-P (Acordão do Tribunal Administrativo de Moçambique).
[190] *Law Society of South Africa case* (n 19).
[191] *Tanganyika Law Society case* (n 28).
[192] *Law Society of South Africa v President of the Republic of South Africa 2018 2 All SA 806 (GP)* (*High Court decision*).
[193] *Law Society case* (n 19) at para 15.

eroding the individuals access to the SADC Tribunal.[194] Cited as respondents in this matter is the former President of the Republic of South Africa, Minister of Justice and Correctional Services and International Relations and Cooperation.[195]

The applicants further sought an order directing the President to withdraw the signature of former President Zuma from the 2014 Protocol.[196] The applicants contended that the President's conduct was constitutionally invalid, irrational and unlawful. The applicants alleged that the unlawfulness of President's conduct lies in the fact that and to the extent that it infringed human rights, the rule of law, and denied South Africans and other citizens of the SADC access to justice in the SADC Tribunal.[197] Another contention, which the Court rejected, was that the President failed to allow public participation before signing the 2014 Protocol.[198]

In a majority judgement, penned by Mogoeng CJ, the Constitutional Court expressed the view that President's participation in the suspension of the SADC Tribunal was contrary to South Africa's commitment to respect international obligations. In other words, the President undermined the very basic principles of the SADC Treaty. In this regard, the Court unequivocally stated:

> Our Treaty obligations, which militate against the President's impugned decisions and conduct, stand because the Treaty has never been amended so as to repeal its provisions relating to individual access to the Tribunal, human rights, the rule of law and access to justice. This means that when our President decided to be party to the suspension of the Tribunal and to actually sign the Protocol, he was acting in a manner that undermined our international law obligations under the Treaty…the President was required to act in good faith and in a manner consistent with the country's obligation to uphold the spirit, object and purpose of the Treaty.61 And this, he failed to do thus rendering this conduct unlawful on this ground as well.[199]

In his conduct, the President incorrectly assumed powers not conferred on him by the Constitution and illegally followed a wrong procedure.[200] The Court reiterated that the 'architectural design' of South Africa's constitutional democracy is shaped by the rule of law and that human rights and access to justice forms part of that framework.[201] The court reminded

[194] Para 1 of the Applicants' Heads of Arguments (Heads of Arguments). Available at http://www.saflii.org/za/cases/ZACC/2018/51hoa.pdf (Accessed 23 September 2021).
[195] *Law Society of South Africa case* at para 8.
[196] *Law Society case* (n 19) para 7.
[197] *Law Society case* (n 19) at para 15.
[198] *Law Society case* (n 19) para 86.
[199] *Law Society case* (n 19) paras 53-55.
[200] *Law Society case* (n 19) para 56.
[201] *Law Society case* (n 19) para 32.

us of the need to have a due regard to international obligations that play a very vital role in South Africa's transformative constitutionalism. Thus, the President, acted without good faith nor legal authority in participating in the suspension of the Tribunal.[202]

The court reiterated that the decision of the President ought to be rational within the constitutional powers of the President. The power to make a decision is rational if there is connection between the purpose of which the power is exercised and the objective sought to achieve.[203] In this regard, the court expressed the view that, the President participated in an attempt to amend the SADC Treaty with no legitimate government purpose to achieve. No objective or mandate from the constitution whatsoever that could be linked to the President's conduct in signing the 2014 Tribunal Protocol.[204] Thus, the court concluded that the President's conduct to put the Tribunal in suspension and altering its jurisdiction was irrational.[205]

The court also found the President's conduct to be unconstitutional. This is so because, the Presidents conduct undermined disregarded, *inter alia,* the Bill of Rights as the cornerstone of South Africa's democracy; the obligation to protect, respect, promote and fulfil the Bill of Rights. The President failed to perform his duty to honour international law obligations and act consistently with that commitment;[206] to recognise access to the Tribunal as an important instrument for the reinforcement of the constitutional right of access to justice in South Africa.[207] According to the court's observation, the conduct of the President purported to frustrate the right to access to justice.[208]

The court, thus, concluded that the President's decision and participation in the events leading to the closure of the Tribunal was unconstitutional, unlawful and irrational.[209] It ordered the President to withdraw his signature to the 2014 Tribunal Protocol.[210] It is noteworthy that the

---

[202] *Law Society case* (n 19) 56.
[203] *Law Society case* (n 19) 61. In *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) the Constitutional Court explained the constitutional rationality principle in relation to the President decisions as follows: "To pass constitutional muster therefore, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution." at paras 49-50.
[204] *Law Society case* (n 19) para 70.
[205] *Law Society case* (n 19) paras 70-71.
[206] *Law Society case* (n 19) para 75.
[207] As above.
[208] *Law Society case* (n 19) para 77. At para 81, Mogoeng CJ states as follows: 'Through his[President] actions, we made common cause with other Member States in the region to deprive South Africans and citizens from other SADC countries of access to justice, even in circumstances where domestic courts lack the jurisdiction to entertain human rights and rule of law-related individual disputes.'
[209] *Law Society case* (n 19) para 93.
[210] *Law Society case* (n 19) para 94.

court was not directly asked to revive the Tribunal, it was rather asked to rule on the participation of the President conduct. In its enquiry, it is apparent that the court raises access to justice as one of the fundamental rights, not only within South Africa's constitutional framework but also for all the SADC citizens. The court emphasises on the significance of the duty to respect international obligations and the SADC Treaty obligations.

It cautioned the shortcut and irregular procedure purporting to amend the SADC Treaty by the Summit. Although the court might have overstepped and breached the principle of separation of powers by ordering the President to withdraw the signature to the 2014 Protocol,[211] the decision led to the signature being withdrawn.[212] The current President's compliance with the court ought to be welcomed and is commendable even in other SADC states.

4.3.3 The *Tanganyika Law Society case*

Like the Law Society of South Africa case, this is an application launched by the applicants before the Tanzania High Court challenging the actions of the respondents in suspending SADC Tribunal. The applicants sought a remedy from the court on the basis that the responded violated constitutional and international human rights provisions. It was alleged that respondent violated, *inter alia*, the Constitution of the United Republic of Tanzania (Tanzania Constitution),[213] the SADC Treaty, African Charter and the Universal Declaration. As in the *LSSA case*, at the centre of discussion was the right of access to justice and the principles of democracy, human rights and the rule of law as provided for in article 4(c) of the SADC Treaty.[214]

The court simplified the legal issue for determination as to 'whether having acceded to the right - access to justice, through the avenue of an international Treaty providing for a Tribunal, the Government can legitimately - under the Constitution, the Treaty and other international legal norms; acting in agreement with other States suspend, or rather, terminate such access.'[215] The court also admitted to determine the issue of 'whether in the exercise of its executive powers

[211] MR Phooko 'Has the SADC Tribunal Been Salvaged by the South African Constitutional Court and the Tanzanian High Court?' (2020) 34(2) *Speculum Juris* 174 at 186.
[212] SADC Summit 'Communique on The 39th Ordinary Summit of the Heads of State and Government of the Southern African Development Community (SADC), held at Julius Nyerere International Convention Centre in Dar es Salaam, United Republic of Tanzania, 17th and 18th August 2019' at para 20. Available at https://www.sadc.int/files/1915/6614/8772/Communique_of_the_39th_SADC_Summit-English.pdf.(Accessed 23 September 2021)
[213] 1977 (Cap. 2 RE 2002) as amended.
[214] *Tanganyika Law Society case* (n 28) at 15.
[215] *Tanganyika Law Society case* (n 28) at 10.

as a Sovereign in the course of entering into; and complying with; international treaties and obligations, the government has powers to derogate from the Constitution.'[216]

It was argued on behalf of the applicants that, when Tanzania signed and ratified the SADC Treaty, it did not do so, exercising a discretionary. But it granted its citizens the right of access to justice, and it was fulfilling a constitutional and international law obligations.[217] The applicants submitted that the subsequent conduct of the respondents in suspending the Tribunal and limiting the access of justice was contrary to the countries international commitments to guarantee its citizens the rights to access to justice.[218] The applicants further alleged that the respondents provided no justification or whatsoever, for limiting individual access to the regional court.[219]

The applicants asked the court to order the respondents to rectify their actions and take measures to ensure that Tanzanian citizens had access to the Tribunal, as guaranteed by the Tanzanian Constitution.[220] It was submitted on behalf the respondents that since the decision was taken by the SADC Summit – a supreme policy-making body of the SADC, it had no power or whatsoever to change the decision.[221] On denial of individual access to justice at regional level, the respondents argued that they have established channels for consideration of individual complaints. They argued that such complaints could be submitted in available local courts, in the East Africa Court of Justice and in the African Court.[222]

It was argued by the respondents that, the SADC Tribunal fell out of the scope of the 'court' as it is defined in the Tanzania Constitution.[223] In its findings, the court noted that, it is in fact not true that individual access was not permitted in the Tribunal as the 2000 Tribunal Protocol was never repealed by the 2014 Tribunal Protocol.[224] It, however, held that the suspension of the Tribunal amounted to the violation of the of access to justice.[225] The court made a suggestion that the Government of Tanzania, reconsider its conduct in participation on the suspension of the Tribunal.[226] The court further, opened doors to entertain any matters arising

[216] *Tanganyika Law Society case* (n 28) at 11.
[217] *Tanganyika Law Society case* (n 28) at 15.
[218] As above.
[219] *Tanganyika Law Society case* (n 28) at 16.
[220] *Tanganyika Law Society case* (n 28) at 20.
[221] *Tanganyika Law Society case* (n 28) at 21.
[222] *Tanganyika Law Society case* (n 28) at 22.
[223] As above.
[224] *Tanganyika Law Society case* (n 28) at 26.
[225] *Tanganyika Law Society case* (n 28) at 44.
[226] *Tanganyika Law Society case* (n 28) at 50.

from the SADC Treaty that may be referred to it by the individuals of Tanzania, while the suspension of the Tribunal lasts.[227]

Unlike the Constitutional Court of South Africa, the court decided not to order the government to withdraw its signature on the new Protocol. It left the matter on the hands of the Executive, respecting the principle of separation of powers.[228] It held as follows:

> The resolution to replace the existing SADC Tribunal Protocol is technically - law and fact, merely a proposal to a1nend the Treaty; as such it is subject to ratification by Parliament. Under the Principle of separation of powers, it is rather premature for Court to rule on the legality or otherwise of the process, which is still in the territory or the Executive pending presentation to the Legislature. All issues relating to participation and involvement of stakeholders relating to the proposed amendments can always he dealt with at the level of the Legislature in accordance with its procedures.[229]

4.3.4 Significance of the two judgements

The two decisions discussed above are of great significance in as far as the call for the revival of the SADC Tribunal is concerned. They provide basis upon which Civil Society Organisations in other SADC member states can put pressure on governments to reconsider their participation in closing the Tribunal. It is also apparent from these two decisions that the suspension of the Tribunal hamstrung the right to access to justice, human rights law commitments by SADC states and it goes against the principle of rule of law. These two decisions clearly indicate that objectives of regional integration cannot be executed in isolation, but the involvement of people and entities in the process requires due regard to international human rights standards.

The recognition of human rights by REC court is not a new phenomenon. The ECOWAS Court for example, recognises human rights. The protection of human rights in the ECOWAS is explored in the following section.

4.4 Comparative analysis – The protection of human rights in ECOWAS

4.4.1 The ECOWAS

Formed in 1975, the Economic Community of West African States ECOWAS is a regional economic bloc uniting the Western African Countries to promote cooperation and development in all fields of economic activity.[230] The ECOWAS Treaty was committed to establishing a free

[227] *Tanganyika Law Society case* (n 28) at 51.
[228] As above.
[229] As above.
[230] Article 2 of the Treaty of the Economic Community of West African States (ECOWAS Treaty).

trade area in West Africa. Like any other REC establishing Treaty, the Treaty has its supplementary instruments including the Declaration of Political Principles of the Economic Community of West African States.[231] The Treaty was later revised 'to essentially to move towards deeper integration and to recognise, promote and protect a political dimension to its economic objectives.'[232]

4.4.2 Protection of human rights in the ECOWAS

The commitment of the ECOWAS to incorporate human rights protection in their integration process can be seen from various provisions of its instruments including paragraphs 4 and 5 of the Declaration of Political Principles. In paragraph 4 ECOWAS states commit themselves 'to respect human rights and fundamental freedoms in all their plenitude including in particular freedom of thought, conscience, association, religion or belief for all our peoples without distinction as to race, sex, language or creed.' In paragraph 5, the ECOWAS states collectively commit "to promote and encourage the full enjoyment by all our peoples of their fundamental human rights, especially their political, economic, social, cultural and other rights inherent in the dignity of the human person and essential to his free and progressive development."

Article 3 of the Revised Treaty set out the ECOWAS principles to achieve its aims which include 'peaceful settlement of disputes; recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; accountability, economic and social justice.'[233] Article 4 also set out the principles for realising the objectives of the ECOWAS which include 'to promote and protect the rights and freedoms contained in the African Charter on Human and Peoples' Rights.'[234] Many other ECOWAS instruments incorporate human rights provisions. It is thus not surprising that the ECOWAS has established several institutions which play a crucial in protecting human rights in the Community.[235] One of these institutions is the ECOWAS Court of Justice which is the point of focus here.

[231] Declaration of Political Principles of the ECOWAS (A/DCL.1/7/91) Abuja, 4 - 6 July 1991 (The Declaration of Political Principles).
[232]Nwauche 'Regional Economic Communities and Human Rights in West Africa and the African Arabic Countries' in Bosl & Diescho (n 167) 321.
[233] Nwauche (n 167) 322.
[234]Nwauche (n 167) 323.
[235] As above.

4.4.3 The ECOWAS Court of Justice

The ECOWAS Court was established in terms of article 15 of the Revised Treaty, and a judicial body to enforce the laws of the ECOWAS.[236] Because the Court was established by Revised ECOWAS Treaty, the court forms an integral part of the Treaty to the extent that it ought to execute its mandate in accordance with the Treaty objectives. This is one reason that justifies the role of the Court in protecting human rights as protected in the establishing Treaty. However, the protection of human rights by the Court was immediate. Initially the court only entertained matters between the member states.[237]

In *Olajide Afolabi v Nigeria*[238] the ECOWAS court declined to hear a human rights complaint by an individual on jurisdictional grounds.[239] The new dawn was only seen through the 2005 Supplementary Court Protocol.[240] In Adjolohoun words: 'The 2005 Supplementary Court Protocol(Court Protocol) literally brought the regional tribunal from the shadows of hypothetical inter-states human rights litigation into the light of promising international human rights adjudication. Articles 9 and 10 of the Protocol empowered the Court to hear individual human rights cases.'[241] Now the ECOWAS people can approach the Court human rights matters.

It is said that since the 2005 Protocol, the court has become the third pillar along with the African Commission and the African Court, giving the West African people an alternative forum to hear human rights disputes.[242] Since the 2005 development to recognise human rights complaints from individuals, the court has made numerous judgments on human rights including on socio-economic rights.[243] One of these is the case of *Hadijatou Mani Koraou v Niger* (The *Koraou case*).[244] In this case the applicant was a slave who had been subjected to the power of the master. She had been raped, abused and subjected to forced labour

[236] ES Nwauche 'Enforcing ECOWAS Law in West African National Courts' (2011) 55(2) *Journal of African Law* 181 at 193.
[237] HS Adjolohoun 'The ECOWAS Court as a human rights promoter? Assessing five years' impact of the Koraou slavery judgment' (2013) 31(3) *Netherlands Quarterly of Human Rights* 342 at 343.
[238] 2004 ECW/CCJ/JUD/01/04.
[239] Adjolohoun (n 243) 343.
[240] Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P1/7/91.
[241] Adjolohoun (n 243) 343.
[242] Adjolohoun (n 243) 344.
[243] As above. See for example *Chief Ebrimah Manneh v Gambia* (2008) ECW/CCJ/JUD/03/08; *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Nigeria Preliminary ruling* (2010) ECW/CCJ/JUD/07/10; *Sidi Amar Ibrahim and Another v Niger* (2011) ECW/CCJ/JUD/02/11.
[244] (2008) ECW/CCJ/JUD/06/08.

compensation for a period close to 10 years. Having failed to find remedy in the Nigerien Supreme Court, the applicant referred the matter to the ECOWAS Court.

Ruling in favour of the applicant, the court found that the government of Niger did not protect the applicant. The court ordered the Niger pay compensation to the applicant.[245] The ECOWAS steps to protect human rights for the benefit of the West African people ought to be applauded. The Community has adopted several instruments and ensured that the people of the ECOWAS do have individual access to the Community to ensure that ECOWAS people can hold their governments accountable on human rights violations. The ECOWAS Court thus serves as an instrument to enforce the fundamental human rights guaranteed in the African Charter and in the ECOWAS instruments.

4.5 Conclusion

In summary, it is apparent in this chapter that human rights and regional integration process cannot be separated. Fundamental human rights are universally recognised, respected, protected and ought to be promoted. Regional integration does not take place in a desert, but unite states of a region and involve movement of the people and thus human rights cannot be disregarded in the process. It is also clear that for the realisation of these fundamental rights, the right of access to justice is key. In this context, access to justice refers to the access of the people to the sub-regional judicial bodies established as Economic Community institutions.

As part of the community integration process, people ought to have their voices heard before the sub-regional economic courts should national courts fail to provide remedy. Hence, the is a need for a sub-regional court with expansive jurisdiction to hear individual complaints against states. It is noted above that in addition the international and African agenda, RECs have also recognised human rights in their founding treaties and made commitments to protect them. In the SADC, the human rights provisions in the SADC Treaty give an impression that the region is committed to fight human rights abuses.

However, the SADC Summit decision in suspending the SADC Tribunal and limiting its jurisdiction brings a different perspective about the region's commitment to human rights protection. It is submitted SADC, by denying its people individual access to the Tribunal is in violation of the people's access to justice and it should reconsider its decision and allow its citizens to hold government accountable.

[245] Adjolohoun (n 243) 345.

It is also apparent that the decision of the Summit, in suspending the Tribunal and blocking the individual access by adopting the 2014 Protocol, has been challenged in two different SADC national courts. In the *Law Society of South Africa case,* the highest court of South Africa found that the South Africa's participation in the Summit decision was unlawful, irrational and unconstitutional. The court ordered its President to withdraw the signature from the 2014 Tribunal Protocol, which he did. Similarly, the Tanzania High Court has found that the participation of the Tanzania Government in the Summit decision amounted to the violation of access to justice and is contrary to Tanzania's constitutional and international obligations.

The court also found a commitment to handle matters that arise out of the SADC Treaty between its people and Tanzania Government, while the suspension still lasts. The two paved the way and it is for this reason that CSOs across the SADC should continue with the call for the restoration of the SADC Tribunal. A comparative analysis was made with ECOWAS. It is noted that the ECOWAS has taken various steps to protect and enforce human rights in its REC; it has established institutions to protect human rights including the ECOWAS Court. The court serves as an important instrument in holding ECOWAS states in cases of human rights violations.

It has jurisdiction to hear complaints by individuals and has made several rulings. This is an important aspect of individuals to hold their states accountable. It is thus suggested that the SADC follow the same approach followed by the ECOWAS. The SADC ought to give back the Tribunal its expansive jurisdiction to fight human rights violations in the region.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

At the heart of this writing is the advocacy for the restoration of the SADC Tribunal. The issue started with the suspension of the SADC Tribunal and the adoption of the 2014 Protocol to the Tribunal. As such this writing focused on matters relating to the restoration of the SADC Tribunal to its original form. First, the focus (of Chapter 2) is on the legislative framework of the SADC, the so-called *SADC Community law*. This chapter sought to establish if there are factors hindering or favouring the restoration of the SADC Tribunal, looking at the available SADC laws. It then focuses on the evolution and the laws leading up to the SADC Tribunal status.

The chapter explores the provisions of the SADC Treaty in relation to the formation and powers of the Tribunal. It looks at the concept of the community law, the applicability of SADC laws vis-à-vis the national laws of the member state. In addition, it explores the influence of the Protocol on the SADC Tribunal and Rules (2000). Secondly, the third chapter mainly focuses on the SADC Tribunal and the role of the regional courts. It sets out the series of events from the formation of the SADC Tribunal. It then discusses the initial jurisdiction of the Tribunal. Subsequently, the chapter explores the challenge to the jurisdiction of the Tribunal.

Besides, it presents the refusal of Zimbambwe to comply with the judgements of the Tribunal in the *Campbell case*. Following the refusal of the Mugabe administration, the challenge to the Tribunal's jurisdiction extends to other SADC member states who joined Mugabe in challenging the jurisdiction of the Tribunal. The bone of contention here is that the Tribunal's jurisdiction to hear human rights complaints from individuals in the SADC. All these events lead to the suspension of the Tribunal by the SADC Summit. The most significant part of chapter two focuses on the role of the sub-regional courts in regional integration. The REC courts are established with the purpose of enforcing laws and providing dispute settlement mechanism in the REC.

As one of the pillar institutions of the REC, the court ought to play a vital role in promoting integration and forging links. In chapter four, the focus shifts to the relationship between RECs and observation of human rights standards. This part explores the recognition and the extent at which human rights are entrenched in the RECs laws. The emphasis of this chapter is the right of access to justice which includes individual rights to bring human rights complaints in the

sub-regional courts. The primary focus of the chapter is to discuss the possibilities of reviving the SADC Tribunal especially with the influence of the two decisions from the SADC national courts; the *Law Society of South Africa case* and the *Tanganyika Law Society case*.

5.2 Findings

It is apparent from this study that the suspension of the SADC Tribunal was problematic and continues to raise questions whether the SADC Summit serve SADC citizens or its political interest. The fall of the SADC Tribunal not only present issues from the human rights point of view. However, the SADC has adopted SADC Treaty, a very comprehensive document establishing various cornerstone institutions, sets out the fundamental principles, objectives and undertakings which form bases for the SADC integration.

The SADC region has its 'community law' through its enactments which make up the legal framework within which the SADC govern its own procedures. It is also noted that these institutions all play a crucial role in fostering regional integration in the region. The 2000 Protocol to the Tribunal and its Rules, set out the jurisdiction, powers and composition of the Tribunal. It is part of the Treaty and allows the Tribunal to hear cases brought by individuals and states. However, in the case of individuals, they must have exhausted local remedies before resorting to the tribunal. The Tribunal is given a mandate to develop its own jurisprudence and, must also consider international law. Hence, the usefulness of the Tribunal cannot be over emphasised.

However, useful as it may be, the Tribunal was suspended by the SADC Summit following the famous *Campbell case* and a new Protocol limiting the jurisdiction of the Tribunal to interstates dispute was proposed. The suspension of this regional tribunal is problematic and ought to be reversed as the Tribunal is one of the cornerstone institutions in fostering integration in the SADC region. In chapter 3, the study notes that, although the clear commitment of the SADC was to have the Tribunal that will attract investors, however before the impact that was anticipated was made, President Mugabe administration in Zimbabwe and the SADC Summit suspended the Tribunal.

The SADC states adopted the new 2014 Protocol to escape litigation brought by individuals. The Protocol limits the jurisdiction of the Tribunal to interstate disputes. The Summit destroyed the Tribunal to ensure that the power of the member states is supreme over rule of law. The main concern in the Campbell case was the Tribunal's jurisdiction on human rights matters. It is apparent that the SADC Treaty does recognise human rights norms, hence the exclusion of

human rights jurisdiction is not justifiable. It is also apparent above the regional economic courts, including the SADC Tribunal play a vital role in promoting regional integration.

Chapter 4 reveals that indeed human rights and regional integration process cannot be separated. The realisation of these fundamental rights through the right to access to justice is key. As part of the community integration process, people ought to have their voices heard before the regional economic courts, should national courts fail to provide remedy. Hence, there is a need for a sub-regional court with expansive jurisdiction to hear individual complaints against states. It is submitted that SADC, by denying its people's individual access to the Tribunal, is in violation of the people's access to justice and it should reconsider its decision and allow its citizens to hold their governments accountable.

In the *Law Society of South Africa case,* the highest court of South Africa found that the South Africa's participation in the Summit decision was unlawful, irrational and unconstitutional. The court then ordered its President to withdraw the signature from the 2014 Tribunal Protocol, which he did. Similarly, the Tanzanian High Court has found that the participation of the Tanzanian Government in the Summit decision amounted to the violation of access to justice and is contrary to Tanzania's constitutional and international obligations. The two judgments paved the way and it is for this reason that Civil Society Organisations (CSO) across the SADC should continue with the call for the restoration of the SADC Tribunal.

A comparative study was made with ECOWAS. The ECOWAS has established the ECOWAS Court which serves as an important instrument in holding ECOWAS states to account in cases of human rights violations. It has jurisdiction to hear complaints by individuals and has made several rulings. Hence, it is suggested here that the SADC should follow in the ECOWAS footsteps and revive SADC Tribunal with expansive human rights jurisdiction.

5.3 Conclusions and recommendations

It is submitted that SADC ought to restore the original powers of the Tribunal and disregard the 2014 Protocol. In any case, the Protocol has not yet been ratified by the two/thirds majority of the member states. Also, the exclusion of human rights jurisdiction and access of individuals cause confusion and contradict the SADC Treaty commitments on human rights. The SADC is trying to divorce human rights from regional integration, which is impossible. It is thus suggested that the SADC should follow the same approach followed by the ECOWAS. The SADC ought to give back the Tribunal its expansive jurisdiction to fight human rights

violations in the region. CSOs in the SADC countries can play a crucial role in pushing this agenda as can be seen from the South African and Tanzanian cases.

Civil societies must put pressure on their governments to review their decisions to support the 2014 Protocol. It is also recommended that a separate and consolidated human rights protocol be adopted, to include the right to access to justice in the SADC. Further, it is noted that with the application of the principle of separation of powers, SADC institutions cannot interfere with the functions of one another. Hence, it recommended that the SADC must adopts the separation of powers doctrine in running its affairs.

BIBLIOGRAPHY

Books

European Union Agency for Fundamental Rights & Council of Europe *Handbook on European law relating to access to justice* (Publications Office of the European Union 2016).

Viljoen, F *International Human Rights Law in Africa* (Oxford University Press 2012).

Chapters in books

Alter, KJ & Hooghe, L 'Regional Dispute Settlement Systems' in Börzel, TA & Risse, T (eds) *Oxford Handbook of Comparative Regionalism* (Oxford University Press 2016).

Erasmus, G 'The domestic status of international agreements: has the South African Constitutional Court chartered a new approach and could regional integration benefit?' in Pisani, A; Erasmus, G & Hartzenberg, T (eds) *Monitoring Regional Integration in Southern Africa Yearbook* (Trade Law Centre for Southern Africa 2012).

Lima, V & Gomez, M 'Access to Justice: Promoting the Legal System as a Human Right' in W Leal Filho, W; Azul, A; Brandli, L; Özuyar, P & Wall, T (eds) *Peace, Justice and Strong Institutions* (Springer 2020).

Nwauche, ES 'Regional Economic Communities and Human Rights in West Africa and the African Arabic Countries' in Bosl, A & Diescho, J (eds) *Human rights in Africa: Legal perspectives in their protection and promotion* (Macmillan Education Namibia 2009).

Oppong, RF 'Making regional economic community laws enforceable in national legal systems - constitutional and judicial challenges' in Bosl, A; Breytenbach, W; Hartzenberg, T; McCarthy, C; Schade, K (eds) *Monitoring Regional Integration in Southern Africa Yearbook* (Trade Law Centre for Southern Africa 2008).

Ruppel, OC 'Regional economic communities and human rights in East and Southern Africa' in Bosl, A and Diescho, J (eds) *Human Rights Law in Africa: Legal perspectives on their Protection and Promotion* (Macmillan Education Namibia 2009).

Tino, E 'Southern Africa Development Community and its 'new' Tribunal: Some remarks' in Hartzenberg, T and Erasmus, G (eds) *Monitoring Regional Integration Yearbook* 2015/2016 (Trade Law Centre for Southern Africa 2016).

Journal articles

Adjolohoun, HS 'The ECOWAS Court as a human rights promoter? Assessing five years' impact of the Koraou slavery judgment' (2013) 31(3) *Netherlands Quarterly of Human Rights* 342.

Ali, AJ 'The admissibility of subregional courts' decisions before the African Commission or African Court' (2012) 6(2) *Mizan Law Review* 241.

Alter, KJ; Gathii, JT & Helfer, LR 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27(2) *The European Journal of International Law* 293.

Barnard M 'Constitutionalising a Human Right to Water in the Southern African Development Community' (2020) 16 *Utrecht Law Review* 60.

Chigara, B 'Introductory Note to Southern African Development Community (SADC) Tribunal - Mike Campbell (PVT) Ltd and Others v. Republic of Zimbabwe' (2009) 48(3) *International Legal Materials* 530.

Chigara, B 'What Should a Re-constituted Southern African Development Community (SADC) Tribunal Be Mindful of to Succeed' (2012) 81 *Nordic Journal of International Law* 341.

Cowell, F 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction' (2013) 13(1) *Human Rights Law Review* 153.

Ebobrah, ST 'Tackling Threats to the Existence of the SADC Tribunal: A Critique of Perilously Ambiguous Provisions in the SADC Treaty and the Protocol on the SADC Tribunal' (2010) 4 *Malawi Law Journal* 199.

El-Agraa, AM 'Economic Rights and Regional Integration: Considering the EU and ASEAN Charters within the Perspective of Global Regional Integration' (2009) 24(4) *Journal of Economic Integration* 634.

Erasmus, G 'Is the SADC trade regime a rules-based system?' (2011) 1 *SADC Law Journal* 1.

Ferreira, G & Ferreira-Snyman, A 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014) 17(4) *Potchefstroom Electronic Law Journal* 1471.

Grossman, N ‘Legitimacy and International Adjudicative Bodies’ (2009) 41(1) *George Washington International Law Review* 107.

Helfer, LR and Slaughter, A ‘Toward a Theory of Effective Supranational Adjudication’ (1997) 107(2) *Yale Law Journal* 273.

Jonas, O ‘Neutering the SADC Tribunal by Blocking Individuals’ Access to the Tribunal’ (2013) 2 *International Human Rights Law Review* 294.

Kawenda, DE ‘Legal integration as a means to Regional Economic Integration: A Southern African perspective’ 2016 13(2) *Jurnal Hukum Internasional* 188.

Lenz, T ‘Spurred Emulation: The EU and Regional Integration in Mercosur and SADC’ (2012) 35(10) *West European Politics* 155.

Metcalf, KN & Papageorgiou, IF ‘Regional courts as judicial brakes?’ (2017) 10(2) *Baltic Journal of Law & Politics* 154.

Mosler, H ‘Supra-National Judicial Decisions and National Courts’ (1981) 4(2) *Hastings International & Comparative Law Review* 425.

Moyo, A ‘Defending human rights and the rule of law by the SADC Tribunal: Campbell and beyond’ (2009) 9 *African Human Rights Law Journal* 590.

Murungi, LN & Gallinetti, J ‘The Role of Sub-Regional Courts in the African Human Rights System.’ (2010) 7(13) *Sur-International Journal on Human Rights* 119.

Mussi F ‘From the Campbell Case to a Recent Ruling of the Constitutional Court of South Africa: Is There Any Hope to Revive the Tribunal of the Southern African Development Community?’ (2020) 28 *African Journal of International and Comparative Law* 110.

Musungu, SF ‘Economic integration and human rights in Africa: A comment on conceptual linkages’ (2003) 3 *African Human Rights Law Journal* 88.

Nagu, Y ‘Opinion: will the African Continental Free Trade Area’s dispute settlement protocol be adequate to ensure compliance’ (2020) 7(1) *Journal of Comparative Law in Africa* 120.

Naldi, GJ ‘Mike Campbell (Pvt) Ltd et al v The Republic of Zimbabwe: Zimbabwe’s Land Reform Programme Held in Breach of the SADC Treaty’ (2009) 53(2) *Journal of African Law* 305.

Ndlovu, PN '*Campbell v Republic of Zimbabwe*: A moment of truth for the SADC Tribunal' (2011) 1 *SADC Law Journal* 63.

Nwauche, ES 'Enforcing ECOWAS Law in West African National Courts' (2011) 55(2) *Journal of African Law* 181.

Oppong, RF 'Legitimacy of Regional Economic Integration Courts in Africa' (2014) 7 *African Journal of Legal Studies* 61.

Ordor, A 'Advancing the Role of Regional Courts for Regional Integration in Africa: A Study of the East African Court of Justice and the ECOWAS Court of Justice' (2018) 45(2) *The African Review* 63.

Phooko, RM & Nyathi, M 'The revival of the SADC Tribunal by South African courts: A contextual analysis of the decision of the Constitutional Court of South Africa' (2019) *De Jure Law Journal* 415.

Phooko, RM 'No longer in suspense: Clarifying the human rights jurisdiction of the SADC Tribunal' (2015) 18(3) *Potchefstroom Electronic Law Journal* 531.

Phooko, RM 'Has the SADC Tribunal Been Salvaged by the South African Constitutional Court and the Tanzanian High Court?' (2020) 34(2) *Speculum Juris* 174.

Phooko, RM 'Revisiting the Monism and Dualism Dichotomy: What Does the South African Constitution of 1996 and the Practice by the Courts Tell Us about the Reception of SADC Community Law (Treaty Law) in South Africa?' (2021) 29(1) *African Journal of International and Comparative Law* 168.

Phooko, RM 'The Direct Applicability of SADC Community Law in South Africa and Zimbabwe: A Call for Supranationality and the Uniform Application of SADC Community Law' (2018) 21 *Potchefstroom Electronic Law Journal* 1.

Robertson, B 'Exhaustion of Local Remedies in International Human Rights Litigation: The Burden of Proof Reconsidered' (1990) 39(1) *The International and Comparative Law Quarterly* 191.

Ruppel, OC 'The Southern African Development Community (SADC) and its Tribunal: Reflexions on a Regional Economic Communities' Potential Impact on Human Rights Protection'2009 42(2) *Verfassung und Recht in Übersee* 173.

Sang Yk, B 'Friends, Persons, Citizens: Comparative Perspectives on *Locus Standi* and the Access of Private Applicants to Sub-Regional Trade Judiciaries in Africa' (2011) 13(2) *Oregon Review of International Law* 355.

Saurombe, A 'The role of SADC institutions in implementing SADC treaty provisions dealing with regional integration' (2012) 15(2) *Potchefstroom Electronic Law Journal* 454.

Shumba, T 'Harmonising Business Laws in the Southern African Development Community (SADC): Should SADC Member States Join OHADA' (2016) *Stellenbosch Law Review* 27(1) 59.

Theses and dissertations

Kefa, RC 'The role of the East Africa Court of Justice in regional integration; emerging jurisprudence and the way forward' LLM Thesis, University of Nairobi, 2006.

Nyirongo, R 'The role of law in deepening regional integration in Southern Africa – a comparative analysis of SADC and COMESA' LLM Thesis, University of Cape Town, 2017.

Phooko, RM 'The SADC tribunal: its jurisdiction, enforcement of its judgments and the sovereignty of its member states' LLD Thesis, University of South Africa, 2016.

Shumba, T 'Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models' LLD Thesis, Stellenbosch University, 2014.

Zenda, F 'The SADC Tribunal and the Judicial Settlement of International Disputes' LLD Thesis, University of South Africa, 2010.

Newspaper articles & websites

Chinaka, C 'Mugabe says Zimbabwe land seizures will continue' Mail & Guardian (Johannesburg) 28 February 2009. Available at https://mg.co.za/article/2009-02-28-mugabe-says-zimbabwe-land-seizures-will-continue/.

Freeth, B 'The Campbell case: Zimbabwean landmark farm test case time line' Mike Campbell Foundation, 15 February, 2018. https://docs.house.gov/meetings/FA/FA16/20180228/106914/HHRG-115-FA16-20180228-SD001.pdf.

Geldenhuys, R ‘A new SADC Tribunal?’ Trade Law Chambers, (Cape Town) 2012 https://tradelawchambers.com/raxo-what-s-on/116-a-new-sadc-tribunal (Accessed 22 September 2021).

Hulse, M ‘Silencing a Supranational Court: The Rise and Fall of the SADC Tribunal’ E-International Relations, 25 October 2012. https://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/.

Khan, I ‘Article 38 of the Statute of the International Court of Justice: A Complete Reference Point for the Sources of International Law?’ The New Jurist (Pölten) (5 April 2019). Available at https://newjurist.com/article-38-of-the-statute-of-the-international-court-of-justice.html (Accessed 22 August 2021).

Mandlate, AC ‘Promoting access to justice in Africa: Key points for advocacy on the Southern African Development Community Tribunal’ Global Campus Africa, Policy Briefs (2019). Available at https://repository.gchumanrights.org/bitstream/handle/20.500.11825/1022/EIUC2019_Africa.pdf?sequence=1&isAllowed=y (Accessed 22 September 2021).

Mtuze, SS ‘Jurisdiction in Electronic Trans-Border Contracts’ The Legal Practise Counsel (Midrand). Available at https://www.lawsoc.co.za/default.asp?sl=&id=1888 (Accessed 07 September 2021).

Ngwenya, N ‘The reinstatement of the SADC Tribunal is a fundamental human rights issue that requires SADC citizens to engage their governments for its immediate reinstatement.’ Bigen Group (Johannesburg) 20 August 2020. Available at https://bigengroup.com/the-sadc-tribunal-what-it-means-for-human-rights-in-the-region/ (Accessed 22 August 2021).

Steyn, P ‘The important role of regional courts in the African Continental Free Trade Area – The Mseto judgment by the East African Court of Justice’ Legal Brief (July 2020). Available at https://www.werksmans.com/legal-updates-and-opinions/the-important-role-of-regional-courts-in-the-african-continental-free-trade-area-the-mseto-judgment-by-the-east-africa (Accessed 29 May 2021).

Swart, M ‘A house of justice for Africa: Resurrecting the SADC Tribunal’ Brookings Institution Press (Washington, DC) 02 April 2018. Available at https://www.brookings.edu/blog/africa-in-focus/2018/04/02/a-house-of-justice-for-africa-resurrecting-the-sadc-tribunal/ (Accessed 04 September 2021).

The Coalition for an Effective SADC Tribunal 'Coalition for an effective SADC Tribunal calls on heads of state to reinstating the SADC Tribunal' (14 August 2015). https://www.southernafricalitigationcentre.org/2015/08/15/coalition-for-an-effective-sadc-tribunal-calls-on-heads-of-state-to-reinstating-the-sadc-tribunal/ Accessed 22 September 2021).

Walsh, JW 'The true meaning of the term 'jurisdiction' (April, 1901) at 347. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6021&context=penn_law_review (Accessed 08 August 2021)

Zongwe, DP 'An Introduction to the Law of the Southern African Development Community' (February 2011). Available at https://www.nyulawglobal.org/globalex/Southern_African_Development_Community.html (Accessed 19 August 2021).

Reports, conference & working papers

Asmelash, HB 'Southern African Development Community (SADC) Tribunal' (15 February, 2016). MPILux Research Paper 2017 (10), Max Planck Encyclopaedia of International Procedural Law.

Erasmus, G 'The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law' Tralac (Stellenbosch) 21 January 2015, Working Paper.

Fanenbruck, C & Meißner, L 'Supranational Courts as Engines for Regional Integration? A Comparative Study of the Southern African Development Community Tribunal, the European Union Court of Justice, and the Andean Court of Justice' KFG Working Paper Series, No. 66, November 2015.

Hartzenberg, T 'Regional Integration in Africa' Trade Law Centre for Southern Africa (tralac) Manuscript date: October 2011.

Richardson, HJ 'African Regional Integration and Human Rights: Potential Problems' (1995) Proceedings of the Annual Meeting (American Society of International Law).

SADC Summit 'Communique on The 39th Ordinary Summit of the Heads of State and Government of the Southern African Development Community (SADC), held at Julius Nyerere

International Convention Centre in Dar es Salaam, United Republic of Tanzania, 17th and 18th August 2019'.

Shivamba, A 'The demise of a legitimate southern African regional court' Southern Africa Litigation Centre (SALC) Policy Brief No. 6 of 2019.

Voeten, E 'Regional Judicial Institutions and Economic Cooperation: Lessons for Asia?' (November, 2010) Working Papers on Regional Economic Integration No.65, Asian Development Bank.

Treaties

Abuja Treaty establishing the African Economic Community, 1994.

African Charter on Human and Peoples' Rights, 1981.

Convention on the Elimination of all Forms of Discrimination Against Women, 1979.

Declaration of Political Principles of the ECOWAS,1991.

European Convention on Human Rights,1950.

European Union Charter of Fundamental Rights, 2000.

International Convention on the Elimination of All Forms of Racial Discrimination, 1969.

International Covenant on Civil and Political Rights, 1966.

International Covenant on Economic, Social and Cultural Rights, 1966.

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003.

Protocol on the SADC Tribunal and the Rules of Procedure, 2000.

Protocol on the SADC Tribunal, 2014.

Statute of the International Court of Justice, 1946.

Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P1/7/91.

The Treaty of the Southern African Development Community, 1992(As Revised).

Treaty of the Economic Community of West African State, 1975 (As Revised).

Universal Declaration of Human Rights, 10 December 1948.

Vienna Convection on the Law of Treaties, 1969.

Constitutions

Constitution of Tanzania 1977 (Cap. 2 RE 2002) as amended.

Constitution of the Republic of South Africa, 1996.

Constitution of Zimbabwe Amendment No. 16 of 2000.

Constitution of Zimbabwe Amendment No. 17 of 2005.

Constitution of Zimbabwe Amendment No. 20 of 2013.

Cases

South African case law

Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC).

Law Society of South Africa (LAWSA) and Others v President of the Republic of South Africa and Others 2018 ZACC 51.

Law Society of South Africa v President of the Republic of South Africa 2018 2 All SA 806 (GP).

Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC).

International case law

Bach's Transport (Pty) Ltd v Democratic Republic of Congo SADC (T) 14/2008, SADCT 6 (11 June 2010).

Certain Norwegian Loans, France v Norway ICJ (06 July 1957) (1957) ICJ Reports 9.

Chief Ebrimah Manneh v Gambia (2008) ECW/CCJ/JUD/03/08.

Fick & Others v Republic of Zimbabwe SADC (T) 01/2010.

Mike Campbell (Pvt) Ltd and Others v The Republic of Zimbabwe SADC (T) 02/2007.

Olajide Afolabi v Nigeria 2004 ECW/CCJ/JUD/01/04.

Sidi Amar Ibrahim and Another v Niger (2011) ECW/CCJ/JUD/02/11.

The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Nigeria Preliminary ruling (2010) ECW/CCJ/JUD/07/10.

Foreign case law

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

Ordem dos Advogados de Moçambique v Republica de Moçambique, Recurso de Apelação No. 26/2016 decidido pelo Acordão No. 74/2016-P.

Tanganyika Law Society v. Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania and the Attorney General of the United Republic of Tanzania Cause No. 23 of 2014 (Judgment delivered on 6 June 2019).