



Maritime, International Trade and Insurance

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THE SADC TRIBUNAL: FORMER PRESIDENT'S TOOTHLESS WONDER, ALMOST.

The Constitutional Court was again called upon to pronounce on the constitutionality of the conduct of the former President Jacob Zuma and has again found against him.

The case arises from the former President's negotiation and signing of the 2014 *Protocol on the Tribunal in the Southern African Development Community* ("Protocol") that seeks to strip the Southern African Development Community Tribunal ("Tribunal") of its most significant powers.

The Tribunal was empowered to hear disputes between individuals and Member States (i.e. SADC states) regarding alleged human rights violations, infringements of the rule of law and undemocratic practices.

Its wide powers have also been used to protect commercial interests from the unlawful exercise of governmental power: it has heard applications brought by individuals and companies aggrieved by Zimbabwe's land policies, employment disputes and cases concerning the failure of customs officials to release property.

However, in the present matter, it was the decisions taken against Zimbabwe that carried with them the seed of the Tribunal's destruction. After numerous decisions by the Tribunal concluding that Zimbabwe had violated certain provisions of the SADC Treaty pertaining to land expropriation without compensation, it fell to the SADC Summit, which comprises the Heads of State of SADC countries, representative of their state communities, to enforce the Tribunal's decisions.

The Summit was unwilling to do so, and instead participated in what the Court described as a strategy by Zimbabwe to avoid future embarrassment by the Tribunal. The Court opined that the Summit chose to disregard the states' binding Treaty obligations in that:

1. the Summit resolved to suspend the operations of the Tribunal by neither reappointing members to the Tribunal whose terms had expired in 2010 and failing to make new judicial appointments to the Tribunal. The effect thereof was to render the Tribunal powerless as it was unable to be quorate; and

2. the Summit then amended the jurisdiction of the Tribunal to prevent it from determining disputes between individuals and Member States by signing a Protocol that provides that Tribunal's jurisdiction is limited to disputes between member states only.

The effect of these acts was to essentially strip the Tribunal of its jurisdiction to determine disputes brought to it by individuals for, amongst other things, human rights violations.

The Court, in considering the President's participation in these events, concluded that the President's conduct was procedurally irregular in that it purported to amend the Treaty by means of a Protocol thus evading compliance with the Treaty's own amendment criteria requiring a three-quarter assent by member states. In so doing, the President also acted outside of the limits of his power afforded in the Constitution and contrary to the ratification of the Treaty (and the provisions contained therein) by Parliament. All constitutional office bearers, including the President, are obliged as agents of the state, to uphold the state's commitments in terms of the Treaty.

The manner in which the President participated in the purported amendment of the Treaty was procedurally irregular. Based on the Court's previous interpretation of the relationship between procedural propriety and rationality, the President's conduct was determined to be irrational.

The Court further found that the effect of his conduct was to interfere with a pre-existing right of access to justice, and his conduct was therefore unconstitutional.

The Court ordered the President to withdraw his signature. By the time the order was granted, Jacob Zuma had left office. The Court acknowledged this but indicated that his conduct was performed as an official of the Office of the Presidency. The order was therefore to be effected by the president in office at the time, namely Cyril Ramaphosa.

The Court's decision and the rebuke carried within its judgment were damning against the former President. The Court found that, in signing the Protocol, the former President threatened a diminishment of our citizens' rights to access to justice through the Tribunal.

The powers of the President contained in the Constitution are extensive and the individual exercising those powers has great responsibility to the state and our SADC and global partners. These powers should always be exercised in a manner that accords with the spirit, purport and objects of the Bill of Rights, and not to appease foreign and international relations. The office of the President is representative of its citizens and not an individual.

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