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Has the SADC Tribunal been Salvaged by the South African Constitutional Court and the Tanzanian High Court?

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Abstract

It has been over a decade since the Southern African Development Community Tribunal (SADC Tribunal) was suspended by the SADC Heads of State and Government in August 2010. Several attempts by human rights bodies to resuscitate the tribunal have provided some form of relief. From one standpoint, the Tanzanian High Court has ruled that it will continue to receive cases that fall within the ambit of the SADC Tribunal until such time that the Tribunal's suspension is lifted. Concerning the 2014 Protocol on the Tribunal in the Southern African Development Community (2014 Tribunal Protocol) which limits the jurisdiction of the SADC Tribunal to inter-state disputes, the Tanzanian High Court found that the protocol was not yet ratified and therefore it was premature for it to deal with issues related to it. Instead, it held that the legislature was better placed to deal with the matter. From another perspective, the South African Constitutional Court ordered the former President of South Africa, President Jacob Zuma, to inter alia withdraw the country's signature from the 2014 Tribunal Protocol but did not open the door to adjudicate future disputes falling within the scope of the SADC Tribunal. The main purpose of this paper is to establish whether the decisions of the South African Constitutional Court and the Tanzanian High Court have any effect on the status of the suspended SADC Tribunal and if so, to what extent that legal effect applies. To

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achieve the said aims, the paper will critically discuss, compare, and contrast the aforesaid decisions which dealt with the same issues but produced different outcomes. The discourse will conclude by advocating for civil society to lobby SADC Heads of State to lift the suspension on the SADC Tribunal, including respecting the principle of separation of powers where a treaty has been signed but not ratified.

Keywords: SADC Tribunal; revival; access to justice; South Africa; Tanzania; separation of powers

1 INTRODUCTION

During the celebration of 25 years since the formation of the Southern African Development Community (SADC), the then Chairperson of SADC and former President of Botswana, Festus Mogae urged SADC Member States to "… continue to be, guided by an appreciation that it is the legacy of our own people's timeless demands for dignity, democracy and development in our past, present and future."[1] The fulfilment of democratic principles and the rule of law remains a major challenge in some of the SADC countries.[2] Unlike the Economic Community of West African States (ECOWAS) and the East African Community (EAC) regions which have functional tribunals, the SADC region has opted to distinguish itself from others by being the only regional block without an operational tribunal.

The SADC Tribunal is the judicial organ of SADC. It was established under article 9(g) as read with article 16 of the SADC Treaty. The Tribunal's duty under article 2 of the Protocol on the Tribunal in the Southern African Development Community (2000 Tribunal Protocol) is to ensure adherence to and proper interpretation of the provisions of the SADC Treaty and its subsidiary instruments, and to adjudicate the disputes that may be referred to it.[3] The decisions of the SADC Tribunal are final and binding on the parties to the dispute.[4] The SADC Tribunal became operational on 22 November 2005. It must be noted that the 2000 Tribunal Protocol was not signed until the ordinary Summit in 2000. In addition, the 2000 Tribunal Protocol was operationalised in an unusual manner.[5] The traditional approach in SADC is that protocols become legally binding when they have been ratified by at least nine Member States to the instrument.[6] This is how other protocols became legally binding on SADC Member States. However, during the course of 2001 the Summit agreed that the "Tribunal Protocol would enter into force without the need for further requirement for individual member states to ratify the Protocol."[7] This occurred when four Member States namely Botswana, Namibia, Mauritius, and Lesotho had already ratified the 2000 Tribunal Protocol in the so-called traditional manner.[8] According to Hulse and Van der Vleuten, there was fear that the 2000 Tribunal Protocol was not going to reach "the necessary number of ratifications by member states, the protocol was instead adopted by the heads of states."[9] As will be demonstrated later in the discussion, this procedural issue was later raised by Zimbabwe when challenging the legitimacy of the SADC Tribunal.[10]

The SADC Tribunal faced many challenges[11] related to its competency to receive and adjudicate human rights disputes especially after issuing an unfavourable ruling against the

1 SADC "SADC Major Achievements and Challenges: 25 Years of Regional Cooperation and Integration," https://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf (4-04-2020).
2 Nathan "Solidarity Triumphs Over Democracy: The Dissolution of the SADC Tribunal" 2011 *DEV DIA* 123–137.
3 See art 2 of the Protocol on Tribunal in the Southern African Development Community (2000) (the 2000 Tribunal Protocol) read with art 16(1) of the SADC Treaty.
4 See article 16(5) of the SADC Treaty; art 32(3) of the 2000 Tribunal Protocol.
5 Fanenburck and Meibner "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" https://core.ac.uk/download/pdf/199428634.pdf (28-07-2020).
6 See for example art 5 of the Agreement Amending the Protocol on the Development of Tourism in the Southern African Development Community.
7 Hulse and Van der Vleuten "Agent Run Amuck: The SADC Tribunal and Governance Transfer Roll-back", in: Börzel and Van Hüllen (eds) *Governance Transfer by Regional Organisations: Patching Together a Global Script* (2015) 89.
8 *Ibid.*
9 *Ibid.*
10 *The Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22 (27 June 2013).
11 Nevin "SADC Tribunal Paid the Price for Threatening States' Authority", https://www.businesslive.co.za/archive/2013-01-28-sadc-tribunal-paid-the-price-for-threatening-states-authority/ (4-04-2020).

Government of the Republic of Zimbabwe.[12]

Following many issues[13] surrounding its legitimacy to preside human rights violation cases, the SADC Heads of State and Government decided to suspend the SADC Tribunal in August 2010.[14] In addition to this, the Summit adopted and signed the 2014 Tribunal Protocol on 18 August 2014 at Victoria Falls, Zimbabwe.[15] The 2014 Tribunal Protocol effectively limits the jurisdiction of the SADC Tribunal to receive and adjudicate disputes between Member States only.[16]

The suspension of the SADC Tribunal could be seen as a blow to access justice at a regional level particularly in countries whose judicial system has collapsed and/or is not capable of providing remedy because of political influence.[17] The civil society through NGO's have not rested since the suspension of the SADC Tribunal in 2010. For example, in the matter between the *Law Society of South Africa and Others v President of the Republic* of *South Africa and Others*,[18] the South African Constitutional Court, *inter alia*, ruled that the suspension of the SADC Tribunal and South Africa's signing of the 2014 Tribunal Protocol was "unconstitutional, unlawful and irrational".[19]

Similarly, the Tanzanian High Court in the matter between *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania*[20] also ruled that the Tanzanian government had violated its obligations under the SADC Treaty when it participated in the processes that resulted in the suspension of the SADC Tribunal, among others.

The main purpose of this paper is to establish what the South African Constitutional Court and the Tanzanian High Court have given the SADC citizens in so far as the status of the suspended Tribunal is concerned. To achieve this, Part 2 critically discusses the decisions delivered by the South African and Tanzanian courts. Part 3 compares and contrasts the aforesaid decisions, including their implications to the principle of separation of powers. Part 4 is the recommendations and conclusion.

2 THE DECISIONS OF THE HIGH COURT OF TANZANIA AND THE CONSTITUTIONAL COURT OF SOUTH AFRICA

This section discusses the two decisions delivered by both the South African Constitutional Court and the Tanzanian High Court. The discourse is followed by an analysis and comparison of the two judgments including lessons (if any) to be learned from the Tanzanian High Court.

The SADC Lawyers' Association took a resolution at its annual general meeting held in Zimbabwe during 2014 that law societies across the SADC region should challenge the legality of their respective governments' conduct in participating in the processes that led to the suspension of the SADC Tribunal and the adoption of the 2014 Tribunal Protocol.[21] In response to this call, the Law Society of South Africa and the Tanganyika Law Society in Tanzania successfully initiated legal proceedings against their respective governments to reverse their conducts which rendered the SADC Tribunal suspended. It is also reported that other law societies in the SADC region are in the process of launching similar court proceedings

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

13 See for example, *Mtingwi v SADC Secretariat* (1/2007) [2008] SADCT 3 (27 May 2008); *United Peoples' Party of Zimbabwe v SADC and Others* (SADC (T) 12/2008) [2009] SADCT 4 (14 August 2009); *Swissbourgh Diamond Mines (Pty) Ltd and Others v Kingdom of Lesotho* (SADC (T) 04/2009) [2010] SADCT 4 (11 June 2010) and *Bach's Transport (Pty) Ltd v Democratic Republic of Congo* (SADC (T) 14/2008) [2010] SADCT 6 (11 June 2010).

14 De Wet "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" 2013 *ICSID REV* 1-1.

15 The 2014 Tribunal Protocol was initially signed by nine SADC countries namely, Zambia, Tanzania, Zimbabwe, Namibia, Mozambique, Malawi, Lesotho, South Africa and the Democratic Republic of Congo. However, following a Constitutional Court of South Africa's ruling in 2019, South Africa withdrew its signature from the 2014 Tribunal Protocol. The 2014 Tribunal Protocol is available at http://www.veritaszim.net/sites/veritas_d/files/Protocol%20on%20the%20Tribunal%20in%20SADC%20-%20August%202014.pdf (6-04-2020).

16 See art 33 of the 2014 Tribunal Protocol.

17 Kasambala "Our Hands are Tied: The Erosion of the Rule of Law in Zimbabwe", https://www.hrw.org/report/2008/11/08/our-hands-are-tied/erosion-rule-law-zimbabwe (25-02-2020).

18 2019 (3) SA 30 (CC).

19 *Ibid. 56.*

20 Cause No. 23 of 2014 (Judgment delivered on 6 June 2019) (decision on file with author).

21 Richard, "Without the SADC Tribunal, "legitimacy of SADC community in jeopardy" – Tanzanian High Court" (Mar. 11, 2020) https://africanlii.org/article/20190621/without-sadc-tribunal-%E2%80%9Clegitimacy-sadc-community-jeopardy%E2%80%9D-%E2%80%93-tanzanian-high-court (16-04-2020).

to challenge the adoption of the 2014 Tribunal Protocol by SADC Heads of State amongst others.[22]

2 1 The Tanzanian High Court

In the matter between *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania*, the applicants were aggrieved by the suspension of the SADC Tribunal. Therefore, they instituted legal action against the respondents on the basis that they were responsible for their conduct as they took part in the processes that resulted in the suspension of the operations of the SADC Tribunal. In particular, the applicants sought the Court to hold the respondents accountable under the Tanzanian Constitution, the SADC Treaty, and other international law human rights norms because their action violated the SADC Treaty, the guaranteed 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.[23]

The main legal issue was "whether having acceded to the right of 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"[24] The other auxiliary issue was "whether in the absence of an operational Tribunal; consequent to admitted actions of the State parties, a State party can be held liable for the acts of SADC in its domestic courts"?[25]

In light of the above, the applicants sought the court to order the government to "withdraw its signature to and denounce" the 2014 Tribunal Protocol because it conflicted with the provisions of the Constitution of Tanzania. Further, the applicants sought the court to order the government "to put in place mechanisms to ensure that Tanzanians have access to the SADC Tribunal in compliance with the provisions of the Constitution."[26]

The applicants argued that by ratifying the SADC Treaty, the Tanzanian government had a constitutional obligation to give effect to the right of access to justice at a regional level as provided for in the SADC Treaty.[27] They further argued that the position taken by Tanzania to limit individual access to the SADC Tribunal was contrary to the States' other commitments under the East African Court of Justice, and the African Court on Human and Peoples' Rights because natural and legal persons have access to the said international courts in disputes involving the State.[28] To advance this argument, the applicants argued that the respondents did not offer any reasons whatsoever from curtailing an individual's right of access to the SADC Tribunal.[29]

Finally, the applicants argued that the Government's actions violated article 23 of the SADC Treaty which requires stakeholders to be involved in, *inter alia*, matters that affect the functioning of the SADC Tribunal, including the reduced mandate to deal with interstate disputes only.[30] According to the applicants, the failure by the government to consult stakeholders "violated the fundamental rights of members of the Petitioner."[31]

In response to the petitioners' submissions, the respondents argued that while the petition was pending before the Court, the SADC Summit adopted the 2014 Tribunal Protocol. Consequently, the allegations that the respondents did not take adequate measures to prevent the decision of the Summit to curtail the jurisdiction of the Tribunal and amendment of the 2000 Tribunal Protocol, had been overtaken by events.[32] Further, the respondents *inter alia* contended that the decision of the Summit cannot be changed "by any other body or authority not even by this [the] court" as the Summit is the supreme policy-making institution

22 Law Society of South Africa "SADC Tribunal Matter" https://www.lssa.org.za/our-initiatives/advocacy/sadc-tribunal-matter/ (11-03-2020).
23 *Tanganyika Law Society* 28; *Law Society of South Africa and Others v President of the Republic of South Africa & Others* Case No. 20282 of 2015 at 4.
24 *Ibid.* 10.
25 *Ibid.* 9.
26 *Ibid.* 20.
27 *Ibid.* 15.
28 *Ibid.* 15–16.
29 *Ibid.* 16.
30 *Ibid.* 24.
31 *Ibid.*
32 *Ibid.* 21.

of SADC.[33]

The respondents further argued that it was within the powers of the Summit under articles 10(1)(2)(8) and 16(2) of the SADC Treaty to "postpone the operations of the SADC Tribunal" and enact the 2014 Tribunal Protocol.[34] Based on this, the respondents argued that the Court had no jurisdiction to reverse the decision of the Summit. Additionally, they contended that the SADC Tribunal's new jurisdiction deals with inter-state disputes. Therefore, individual claims against the States were misplaced.[35]

All in all, the respondents argued that the suspension of the operations of the SADC Tribunal and failure or refusal to appoint judges, contrary to the precise treaty provisions, was inimical to the rule of law as a foundational principle inherent to the legitimacy of the community, and as expressly entrenched in the SADC Treaty.

Concerning access to justice, the respondents argued that the government has ensured that in line with the Tanzanian Constitution, individuals and communities have *locus standi* to bring cases before domestic courts including lodging an appeal to the Court of Appeal of Tanzania.[36] To buttress their argument, the respondents further submitted that the people of Tanzania also have access to the East African Court of Justice and the African Court of Human and Peoples' Rights[37] to vindicate their constitutional rights.[38] The respondents further argued that the word "Court" as defined in the Constitution of Tanzania "does not include the SADC Tribunal" but only extends to internal courts.[39]

After evaluating the parties' submissions, the Court first indicated that "it is [was] not correct, as a matter of fact and law" that the 2000 Tribunal Protocol was repealed by the 2014 Tribunal Protocol.[40] In other words, the 2000 Tribunal Protocol is still in force and therefore individuals have access to the SADC Tribunal. The Court expressed its displeasure with both the applicants' and the respondents' conduct of concealing information indicating that the Summit had adopted the 2014 Tribunal Protocol on 18 August 2014.[41] However, this information was only known by the Court for the first time on 20 March 2015 through the applicants' written submissions.[42] It also came up on 10 April 2015 through the respondents' reply to the applicants' written submissions. To this end, the Court expressed its disapproval as follows:

> … both counsels' conduct on this matter was reprehensible; more so, on the part of the office of the Attorney General the active participant in both processes. The developments were fundamental to the constitutive cause of action…[43]

It is unclear as to why counsels had not raised this matter for the necessary amendment of the pleadings timeously so that the Court may have determined whether the initial cause of action had been overtaken by new developments or whether there was any remedy to be given by the Court. This is unacceptable as legal practitioners are officers of the Court[44] and have a duty to assist the Court by making available relevant information before it.

33 *Ibid.*
34 *Ibid.*
35 *Ibid.* 22.
36 *Ibid.*
37 It must be noted that after losing the present case, the Tanzanian government withdrew individual access to the African Court on Human and People's Rights. See Da Silva, "Individual and NGO Access to the African Court on Human and Peoples' Rights: The Latest Blow from Tanzania" https://www.ejiltalk.org/individual-and-ngo-access-to-the-african-court-on-human-and-peoples-rights-the-latest-blow-from-tanzania/ (1-01-2020).
38 *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania* 22.
39 *Ibid.*
40 *Ibid.* 26.
41 *Ibid.* 4.
42 *Ibid.*
43 *Ibid.* 7.
44 Timberlake Jr. "The Lawyer as an Officer of the Court" 1925 *VA. L. REV.* 263–263.

The Court emphasized that the 2000 Tribunal Protocol formed an integral part of the SADC Treaty.[45] Consequently, any amendment to the 2000 Tribunal Protocol as admitted by the respondents amounts to an amendment to the SADC Treaty.[46] Therefore such amendment had to conform to the provisions of the SADC Treaty.[47] Additionally, the Court stated that:

> … the SADC Tribunal was rendered secure from any control or influence of any State parties, and could not, as an independent tribunal be held hostage to unilateral withdrawal of confidence expressed in a motion challenging its legality by one of the State party, before another institution of the Community.[48]

In light of this, the Court found that the decision to suspend the SADC Tribunal on grounds of its legality *inter alia* "eroded existing rights of parties" who had been assured of the existence of a functional and independent sub-regional judicial organ to which they could bring cases of violation of their human rights.[49] Further, the Court held that in its view, the suspension of the SADC Tribunal amounted to clear violation of the peoples' rights at different levels as citizens of SADC to be protected by law as provided for in the SADC Treaty.[50] The Court emphasized that "in the absence of a functional Tribunal, the rule of law in the internal management of SADC and its institutions would be nothing but a pipe dream."[51] The Court further stated that when the SADC Member States suspended the SADC Tribunal, they "rendered themselves liable to action for SADC acts in the domestic courts" because SADC law is part of the Tanzania domestic law.[52]

The Court concluded that the failure or refusal to appoint judges contravened the duty to constitute the SADC Tribunal as provided for in the SADC Treaty.[53] The Court called upon the respondents to honor their obligations arising from the SADC Treaty. Also, the Court warned that the absence of a tribunal that has jurisdiction over individuals as required by both the SADC Treaty and the 2000 Tribunal Protocol placed "the legitimacy of SADC as a Community and international personality ... in jeopardy."[54] To this end, the Court encouraged the respondents to advise the Tanzanian government to review its position to withdraw from the SADC Tribunal.[55]

About the 2014 Tribunal Protocol being in place, the Court said that the resolution to replace the existing 2000 Tribunal Protocol is still a proposal to amend the SADC Treaty because it is still subject to ratification by Parliament.[56] Consequently, based on the principle of separation of powers, the Court found it premature to deal with this aspect. In the Court's words, this matter was "still in the territory of the Executive."[57]

In an unprecedented move, the Court further held that "pending reopening doors of the suspended SADC Tribunal", it has "inherent powers to adjudicate disputes between individual and legal persons against the Government of Tanzania in matters arising out of the SADC Treaty."[58]

This is a progressive decision from a human rights point of view because the Tanzanian High Court essentially opens the door to Tanzanian citizens to bring cases arising from the SADC Treaty before it until such time that the SADC Tribunal becomes operational.

45 *Ibid*; *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania* 27.
46 *Ibid.*
47 *Ibid.*
48 *Ibid* 44.
49 *Ibid.*
50 *Ibid* 45.
51 *Ibid.*
52 *Ibid.*
53 *Ibid* 46.
54 *Ibid.* 50.
55 *Ibid.*
56 *Ibid.*
57 *Ibid.*
58 *Ibid.* 51.

2 2 The South African Constitutional Court

In the case of *Law Society of South Africa and Others v President of the Republic* of *South Africa and Others*, the applicants challenged the role and participation of the then President of the Republic of South Africa in the processes that eventually resulted in the suspension of the SADC Tribunal in 2011. They also challenged the President's decision to sign the 2014 Tribunal Protocol which purported to establish a new Tribunal with limited jurisdiction. The 2014 Tribunal Protocol restricts the jurisdiction of the SADC Tribunal to hear inter-state disputes only, thereby removing the rights of individuals, both in South Africa and the entire SADC region to access the Tribunal for legal redress.

Before the said issues could be heard, the respondents raised a preliminary objection and alleged that it was premature for the Court to adjudicate the case on the basis that the Government had signed but not ratified the 2014 Tribunal Protocol.[59] Consequently, they argued that it had no implications whatsoever at a domestic level. The Court dismissed the preliminary objection on the ground that the signing of a treaty by the South African President "creates far-reaching possibilities that could have irreversible consequences" even before South Africa could ratify it.[60]

The issue to be decided by the Court was the constitutionality of the President's conduct which includes participation in the processes that resulted in the suspension of the SADC Tribunal and the adoption of the 2014 Tribunal Protocol thereby denying South African citizens access to justice at a sub-regional level.[61]

The applicants argued that the President's conduct was, *inter alia*, irrational, violated human rights, the rule of law, and denied South African citizens access to justice at sub-regional level.[62] They further contended that his conduct violated the Constitution.[63] In response to these submissions, the respondents argued that the President's signature on the 2014 Tribunal Protocol did not in any way violate the SADC Treaty or the 2000 Tribunal Protocol.[64]

The Court held that the 2010 and 2011 SADC Summit's decisions which effectively resulted in the suspension of the operation of the SADC Tribunal by not renewing the term of judges and the signing of the 2014 Tribunal Protocol destroyed the SADC Tribunal. It further ruled that there was no legal basis for the President to have acted in a manner that violated the provisions of a binding treaty. Importantly, the Court noted that the "Protocol that operationalised the Tribunal is an integral part of the Treaty."[65] Based on this, it emphasized that the 2000 Tribunal Protocol "may therefore only be lawfully tampered with in terms of the provisions of the Treaty that regulate its amendment."[66] According to the Court, this could not be achieved via a protocol such as the 2014 Tribunal Protocol which somehow required a less rigorous process.[67] In the Court's words:

> The Summit, however, sought to amend the Treaty through a protocol, thus evading compliance with the Treaty's more rigorous threshold of three-quarters of all its Member States. The protocol route would have been an easy way out in that it only requires the support of ten Member States to pass. But, it is not a legally acceptable procedure for stripping the Tribunal of the most important aspect of its jurisdiction.[68]

Considering this, the Court ruled that the decision of SADC Member States to amend the SADC Treaty through the easier process of signing the 2014 Tribunal Protocol by ten SADC Member States was a clear failure to understand and honour the obligations flowing from the SADC Treaty.[69] The Court concluded that by suspending the SADC Tribunal, the President acted in a manner that compromised South Africa's international law obligations under the SADC Treaty.[70]

In conclusion, the Court confirmed the order of the High Court and ruled that the President's participation in the processes that resulted in the suspension of the SADC Tribunal

62 *Law Society of South Africa* and *Others v President of the Republic of South Africa and Others*, applicant's written submissions paras 20 and 23 (on file with author).
63 *Ibid.*
64 *Law Society of South Africa* and *Others v President of the Republic of South Africa and Others*: State's written submissions para 4.30 (on file with author).
65 Nevin "SADC Tribunal Paid the Price for Threatening States' Authority" 48.
66 *Ibid.* 48.
67 *Ibid.*
70 *Ibid.* 53.

and the adoption of the 2014 Tribunal Protocol was unconstitutional, unlawful and irrational.[71] Furthermore, the Court concluded that the President's signature on the 2014 Tribunal Protocol was unconstitutional, unlawful and irrational. Therefore, the President was ordered to withdraw his signature from the 2014 Tribunal Protocol. The President subsequently withdrew South Africa's signature from the 2014 Tribunal Protocol.[72]

This is a good decision from the South African Constitutional Court and reaffirms South Africa's commitment to its international law obligations. However, the Court appears to have gone too far by directing the President to withdraw South Africa's signature from the 2014 Tribunal Protocol. The principle of separation of powers seems to be compromised. This aspect will be dealt with in detail in the next section.

3 A COMPARISON OF THE SOUTH AFRICAN CONSTITUTIONAL COURT AND THE TANZANIAN HIGH COURT

This section compares and contrasts both the decisions of the South African Constitutional Court and the Tanzanian High Court. It also draws preliminary concluding remarks based on the comparison of the two decisions including the principle of separation of powers.

It is important to note that both the South African Constitutional Court and the Tanzanian High Court found that the Heads of State acted unlawfully in the processes that led to the suspension of the SADC Tribunal including participating in the signing of the 2014 Tribunal Protocol. Both courts further indicated that the suspension of the SADC Tribunal was unlawful and violated the SADC citizens' right of access to justice at a regional level. Additionally, both the courts were clear in that both governments should discharge their treaty obligations arising from the SADC Treaty and the 2000 Tribunal Protocol in good faith.

The other crucial point that both the Tanzanian High Court[73] and the South African Constitutional Court[74] noted is that the 2000 Tribunal Protocol formed an integral part of the SADC Treaty. The 2000 Tribunal Protocol became operational through an amendment of the SADC Treaty by the Summit.[75] The Summit had the power to amend the SADC Treaty if three-quarters of its members adopted the amendment.[76] The amendment to the SADC Treaty was therefore validly effected by way of an agreement that amended article 16(2) of the SADC Treaty to provide that the 2000 Tribunal Protocol was an integral part of the Treaty.[77] The amending agreement accordingly came into force on the date of its adoption by the aforesaid required number of all members of the Summit on 14 August 2001. This also triggered the operation of the 2000 Tribunal Protocol as it is an integral party of the amendment to the SADC Treaty. Therefore, both the governments could not amend the 2000 Tribunal Protocol through an easy process, (i.e. signature by ten Member States). Furthermore, both the courts condemned the unlawful stripping of the SADC Tribunal's powers. This matter deserves further attention as it eventually resulted in the suspension of the SADC Tribunal. The manner in which the 2000 Tribunal Protocol entered into force was undoubtedly bound to haunt the SADC Tribunal in the long run. This had nothing to do with the traditional approach that protocols become legally binding when they have been ratified by at least nine Member States to the instrument.

71 *Ibid.* 56.
72 Ngatane "Ramaphosa Withdraws SA from Controversial SADC Tribunal Protocol", (Apr. 18, 2020) https://ewn.co.za/2019/08/18/ramaphosa-withdraws-sa-from-controversial-sadc-tribunal protocol (18-04-2020); Asmeslash "Southern African Development Community (SADC) Tribunal", https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/2496_Southern_African_Development_Community_Tribunal.pdf (18-04-2020).
73 *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania*, 27.
74 *Law Society of South Africa and Others v President of the Republic of South Africa and Others*, Nevin "SADC Tribunal Paid the Price for Threatening States' Authority" 49.
75 Southern Africa Litigation Centre's written submissions available at https://www.southernafricalitigationcentre.org/2018/12/10/south-africa-amicus-curiae-in-law-society-of-south-africa-case-challenging-sas-signing-of-new-sadc-tribunal-protocol/ (28-07-2020).
76 *Ibid.*
77 *Ibid.*

It must be noted that after the Tribunal had issued unfavourable judgments against Zimbabwe, the Government of Zimbabwe refused to comply with the decisions of the Tribunal and challenged its authority.[78] In particular, the former Justice Minister Chinamasa of Zimbabwe gave notice of the country's withdrawal from the SADC Tribunal on the basis that it lacked jurisdiction, amongst others, over Zimbabwe because the 2000 Tribunal Protocol was not ratified by two-thirds of the total number of SADC Member States as required by the Treaty.[79] Consequently, Minister Chinamasa indicated that Zimbabwe was not going to appear before the SADC Tribunal and would not respond to any action instituted or pending against Zimbabwe before the SADC Tribunal.[80] Finally, Minister Chinamasa asserted that any decision made by the SADC Tribunal against Zimbabwe would be ignored.[81] It is submitted that the arguments raised by Zimbabwe against the SADC Tribunal were strange, based on the following factors: Zimbabwe did not initially object to the 2000 Tribunal Protocol when it came into force but acted together with other States and appointed judges of the Tribunal in terms of article 4(4) of the 2000 Tribunal Protocol during August 2005; The 2000 Tribunal Protocol was signed by SADC Heads of State or Government including Zimbabwe on 7 August 2000;[82] Article 35 of the 2000 Tribunal Protocol provides that "[t]his Protocol shall be ratified by Signatory States in accordance with their constitutional procedures." In addition, article 38 states that "[t]his Protocol shall enter into force thirty (30) days after deposit in terms of Article 43 of the Treaty, of instruments of ratification by two thirds of the States." Indeed, the 2000 Tribunal Protocol was not ratified as required by the provisions of article 35 of the 2000 Tribunal Protocol. During 2002, the 2000 Tribunal Protocol was amended by the Agreement Amending the Protocol on the Tribunal of 3 October 2002.[83] The Amended Protocol was signed by Zimbabwe and other SADC Member States. The Amended Protocol effectively dealt away with the ratification procedure and entry-into-force requirements that were provided for in articles 35 and 38 of the 2000 Tribunal Protocol. Article 21 of the Amended Protocol regulates the entry into force and provides that "[t]his Agreement shall enter into force on the date of its adoption by three-quarters of all Members of the Summit." All in all, this means that the procedure set forth in the 2000 Tribunal Protocol is no longer relevant because the Amended Protocol has brought about a new mechanism. The adoption of the Amended Protocol by three-quarters of the members of the Summit in 2002 rendered it binding on Zimbabwe and other SADC Member States. It is therefore submitted that the said processes do not nullify the validity of the 2000 Tribunal Protocol including the amendment thereof. The basis for this is that under international law, a treaty may be amended by any means chosen by the parties to the treaty/protocol.[84] This is regardless of whether there was a traditional procedure or not. Additionally, there is no requirement that amendments must be ratified in order to be operational. Instead, the manner in which the amendment enters into force may be agreed to by Member States, as was the case with SADC Member States when they chose a different procedure to ratify the 2000 Tribunal Protocol and the amendment thereof.[85]

78 *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012).
79 *The Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22 (27 June 2013).
80 *The Government of the Republic of Zimbabwe v Fick and Others* para 10.
81 *The Government of the Republic of Zimbabwe v Fick and Others* para 10.
82 The full text of the SADC Protocol Tribunal is available at http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/sadc/6Protocol_on_Tribunal.pdf (28-07-2020).
83 The full text of the Amended Protocol on the Tribunal is available at http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/20071107_AGREEMENT_AMENDING_THE_PROTOCOL_ON_TRIBUNAL-ENGLISH.pdf (28-07-2020).
84 Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 512, para 5.
85 See arts 39 and 40 of the Vienna Convention on the Law of the Treaties.

Zimbabwe's legal challenge on the legality of the 2000 Tribunal Protocol and the amendments thereof has also not been accepted by many other scholars[86] including by a consultant who was appointed to review the role of the SADC Tribunal.[87] It is submitted that the decision of the SADC Tribunal touched on the sensitive political land issue and that triggered its downfall as it sought to reverse a constitutionally mandated land reform project in Zimbabwe.[88] Zimbabwe's challenge to the legitimacy of the Tribunal was a politically motivated move. Ultimately, it is submitted that the procedure leading to the adoption of the 2014 Tribunal Protocol was a central aspect that was overlooked by SADC Heads of State and/or their legal advisers because they sought to amend the 2000 Tribunal Protocol which forms an integral part of the SADC Treaty outside the permissible grounds (i.e. three-quarters of all the members of the Summit).[89] It is important to note that when the Summit adopted the 2014 Tribunal Protocol, it ignored the aforesaid procedure (three-quarters of all the members of the Summit). Instead, it followed the provisions of article 22 of the SADC Treaty which deals with a procedure for concluding protocols in general. This was confirmed in *Government of the Republic of Zimbabwe v Fick* that the 2000 Tribunal Protocol is not subject to a procedure provided for in article 22 of the SADC Treaty.[90]

The South African Constitutional Court surprisingly went a step further and ordered the president to withdraw his signature from the 2014 Tribunal Protocol. The South African government adhered to this ruling even though the 2014 Tribunal Protocol was only signed but not ratified. This could be viewed as judicial overreach as the Court dealt with a matter that was still subject to a parliamentary process. However, the Tanzanian High Court was hesitant to order the government to withdraw its signature from the 2014 Tribunal Protocol. This is evident where the Court indicated that the resolution to replace the 2000 Tribunal Protocol with the 2014 Tribunal Protocol was "merely a proposal" something that was still "subject to ratification by Parliament."[91] Based on this, the Court found that it was premature to deal with the matter based on the separation of powers.[92] Furthermore the Court, contrary to the South African Constitutional Court, appeared to have adopted a soft approach. This is evident where it encouraged the respondents to advise the government to reconsider its decision of withdrawing from the 2014 Tribunal Protocol.[93] One could agree with the Court here as showing respect for the separation of powers. Both South Africa and Tanzania are dualistic States and treaty law still need to be transformed into local law in order to be applied by the domestic courts.

The Tanzanian Court further stated that until the suspension on the SADC Treaty has been lifted, it will continue receiving and adjudicating over disputes arising from the SADC Treaty. The South African Constitutional Court did not say anything to this effect and therefore it remains unclear whether it can deal with a case involving a dispute regarding the SADC Tribunal as indicated by the Tanzanian High Court. It is submitted that such an opportunity could not be ruled out given how the South African courts have openly dealt with matters arising from the SADC Treaty and/or the SADC Tribunal.[94]

What is also apparent from the Tanzanian decision is the influence of the South African judgments which had earlier ruled against the South African Government's decision of signing the 2014 Tribunal Protocol. This is evident for example where the Tanzanian High Court cited

86 Hondora "The Establishment of the SADC Tribunal: Troubled Beginnings" available at http://ssrncom/abstract=1727342 (28-07-2020).

87 Bartels "Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal" (Final Report) March 2011 available at http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report (28-07-2020).

88 *Campbell (Pvt) Ltd & Another v Minister of National Security Responsible for Land, Land Reform and Resettlement & Another* SC 49/07 [2008] ZWSC 1 (22 January 2008).

89 Article 36 of the SADC Treaty in full provides, "An amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit" or art 37 of the 2000 Tribunal Protocol which provide the same procedure for amendment.

90 [2012] ZASCA 122 paras 38–39.

91 *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania*; Nevin "SADC Tribunal Paid the Price for Threatening States' Authority" 50.

92 *Ibid.*

93 *Ibid.*

94 See for example, *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC); *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012); and *Government of the Republic of Zimbabwe v Fick* (47945/10, 72184/10, 77881/09) [2011] ZAGPPAC 76 (6 June 2011).

with approval the South African High Court decision which ruled that:

> South Africa remains bound by the treaty and the first protocol. Amending the treaty and without terminating the first protocol, the executive has no authority to participate in a decision in conflict with South Africa's binding obligations.[95]

Perhaps it is on these grounds that Erasmus has rightly asked: "where do these judgments by senior national Courts in two of the SADC Member States leave the original SADC Tribunal?"[96] In his view, it is the civil society that has emerged victorious from the two domestic courts and it is up to the Governments to comply with the court orders.[97] Whether or not the respective governments would be "prepared to re-open this matter and pursue the review of the decision to abolish the SADC Tribunal" remains to be seen.[98] Erasmus' concerns are valid given the fact that these are decisions of domestic courts. It is submitted that both the South African Constitutional Court and the Tanzanian decisions are likely going to serve as persuasive authority in other SADC jurisdictions should similar cases arise in other SADC Member States. The basis for this is that domestic decisions have legal effect on international law.[99] First, domestic courts make States to abide by their international law obligations through enforcing international law domestically.[100] In this way, domestic courts remind States about the customary law principle for States to discharge their treaty obligations *pacta sunt servanda* as contained in the Vienna Convention of the Law of the Treaties.[101] Consequently, States cannot invoke their domestic laws to evade or violate their treaty obligations.[102] In this way, a domestic court decision becomes attributable to the State concerned and such State has a duty to comply with that decision.[103] In other words, a State's violation of international law triggers international responsibility against the State concerned. Because this decision is binding against the State concerned including the Head of State, it is submitted that since the Heads of State are part of the Summit, they are bound to report that their domestic courts have ruled against their conduct and therefore they are bound to act in a manner that upholds the SADC Treaty and the 2000 Tribunal Protocol. Accordingly, they may not participate in proceedings that jeopardise the future functioning of the SADC Tribunal. This has the potential to influence other SADC leaders within the Summit to mend their ways for the revival of the SADC Tribunal. South Africa plays an influential role within SADC and it is expected that it should defend the SADC Tribunal. The decision of the Constitutional Court ordering South Africa's government to withdraw her signature from the 2014 Tribunal Protocol was cited with approval by the Tanzanian High Court. It is submitted that this shows the influence of a domestic decision on other SADC countries to hold their leaders accountable for violating SADC community law. To this end, both the South African and Tanzanian presidents would, in an ideal world, be expected to inform their counterparts in the Summit about the impact of the decisions of the domestic courts on their conduct when engaging in international affairs and advise their fellow countrymen to follow suit and revive the SADC Tribunal. Such efforts will require "considerable political courage" to lobby other SADC leaders to lift the suspension of the SADC Tribunal.[104] In this way, domestic decisions would have a tangible effect on international law through SADC Heads of State. However, this could be difficult because of the manner in which SADC leaders usually vote; in terms of solidarity as opposed to principle and the rule of law. Nevertheless, such a possibility could not be ruled out. The question is whether future leaders may have the interests of SADC citizens at heart. Secondly, domestic judicial decisions contribute to shaping and interpreting international law so that it is understood as binding.[105] International law has no police force. Therefore,

95 *Tanganyika Law Society* 28; *Law Society of South Africa and Others v President of the Republic of South Africa & Others*; Nevin "SADC Tribunal Paid the Price for Threatening States' Authority" 71.

96 Erasmus"Another Ruling Against the Dismantling of the SADC Tribunal" https://www.tralac.org/blog/article/14149-another-ruling-against-the-dismantling-of-the-sadc-tribunal.html#:~:text=In%20December%202018%2C%20the%20South,was%20unconstitutional%2C%20unlawful%20and%20irrational (28-07-2020).

97 *Ibid.*

98 *Ibid.*

99 Ammann *Domestic Courts and Interpretation of International Law* (2020) 137.

100 *Ibid.*

101 Article 26 of the Vienna Convention on the Law of the Treaties.

102 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, of 4 February 1932 PCIJ Series A/B No 44 21 at 24.

103 Ammann *Domestic Courts and Interpretation of International Law* 138.

104 *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania*; Nevin "SADC Tribunal Paid the Price for Threatening States' Authority" 50.

105 Erasumus"Another Ruling Against the Dismantling of the SADC Tribunal" 138.

when domestic courts enforce international law, they "reinforce" or give effect to international law. Finally, it has been observed that significant areas of public international law such as the law of immunity have been shaped by domestic court jurisprudence.[106] This is testimony that domestic court decisions have a major effect on international law including in creating state practice that eventually bind states. Despite the above exposition, it is conceded that there is "reluctance to deem domestic rulings authoritative on the international plane" because of the nature of judicial law-making in domestic law.[107]

Furthermore, it is evident from both decisions that the courts, based on the principle of the rule of law including access to justice, are against the suspension of the SADC Tribunal. Even though the courts have taken different approaches in their conclusions, both judgments show that SADC leaders remain accountable for their sub-regional actions before the domestic courts.

Considering the above exposition, it is submitted that the SADC Tribunal has, to a limited extent, been salvaged by both the South African Constitutional Court and the Tanzanian High Court. However, both the decisions do not have a tangible impact on the SADC Tribunal. The basis for this is that even though Tanzanian citizens or South African citizens may approach domestic courts on issues arising from the SADC Treaty, the SADC Tribunal remains suspended. It is hoped that similar legal actions intended as the resurrection of the SADC Tribunal will spread to other parts of the SADC region and hopefully produce favourable results. This might be nigh on impossible because it mostly depends on the political will of SADC Member States. For example, a similar court action was not successful before Mozambique's courts.[108]

With South Africa having withdrawn its signature from the 2014 Tribunal Protocol, there are now eight States namely, the Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Tanzania, Zambia and Zimbabwe which have signed the Protocol. South Africa's withdrawal in principle delays the adoption of the controversial 2014 Tribunal Protocol, because ten signatures are required. It is reported that none of the SADC Presidents who had signed the 2014 SADC Protocol was still in power.[109] It is therefore hoped that the new leaders will show political will and support the revival of the SADC Tribunal without the costly and time-consuming legal process across SADC countries.

3 1 Separation of Powers

Davis J once remarked in *Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly and Others* that: "judges cannot be expected to dictate to Parliament when and how they should arrange its precise order of business, matters."[110] These words have become more relevant as the role of the Constitutional Court of South Africa arguably seems to be encroaching on that of the Executive.

The South African Constitutional Court plays an important role in transformative constitutionalism which involves interpreting the Constitution of South Africa, 1996 in a manner that promotes human rights and safeguards against the abuse of power by any other branch of government.[111] To this end, the Court initially seemed to be too cautious when dealing with cases involving other branches of government and therefore "exercised restraint founded on the separation of powers doctrine by not interfering with the decisions of the other branches of government, provided that their actions and decisions are in line with the Constitution."[112] However, this appears to be no longer the case as the Court has been lately accused of judicial overreach and assumed legislative powers.[113]

It is conceded that in a constitutional democracy that has a clearly defined role for each

106 Study Group: Principles on the Engagement of Domestic Courts with International Law 6 (on file with author).
107 Ammann *Domestic Courts and Interpretation of International Law* 144.
108 Presentation at a seminar by Dr. Zuzgo Lungo, The Past, Present and Future of the SADC Tribunal held on 04 March 2020 at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law, Johannesburg.
109 Richard "Without the SADC Tribunal".
110 2013 (4) SA 243 (WCC) 32.
111 Sang "The Separation of Powers and New Judicial Power: How the South African Constitutional Court Plotted Its Course" 2013 (3) *ELSA MA. L. REV.* 96–104.
112 Seedorf and Sibanda "Separation of Powers" in Woolman, Roux, Klaaren, Stein, Chaskalson and Bishop (eds) *Constitutional Law of South Africa* (2 edn, OS, March 2008) Chapter 12, 12–56.
113 See for example, *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CCT76/17) [2017] ZACC 47 (29 December 2017). In this case, the Constitutional Court was divided on

of the branches of government, namely, the legislature, executive and the judiciary, there are bound to be possibilities of conflict from time to time when one institution is intruding into the domain of another. Accordingly, courts should be cautious on how they exercise their powers in the administration of justice. In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* the Constitutional Court was clear when it said:

> The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution.[114]

However, it can be argued that in the present case, the Constitutional Court's conduct amounted to judicial overreach in directing the president to withdraw his signature from a merely signed 2014 Tribunal Protocol. This was simply too much. The Court had already pronounced on the conduct of the President when it said:

> 1.1 The President's participation in the decision-making process and his own decision to suspend the operations of the Southern African Development Community Tribunal *is unconstitutional, unlawful and irrational*.
> 1.2 The President's signature of the 2014 Protocol on the Tribunal in the Southern African Development Community *is unconstitutional, unlawful and irrational* (emphasis added).[115]

Consequently, it was not necessary for the Court to further have stated that "[t]he President is directed to withdraw his signature from the 2014 Tribunal Protocol."[116] At the very least, the Court ought to have ordered the Government to consider rectifying its decisions in line with the obligations flowing from both the Constitution and the SADC Treaty. It is on these basis that I think the Court went far beyond its powers. On the contrary, the Tanzanian High Court decision is supported because in my view it delicately dealt with the matter at hand without surpassing its powers.[117] There, the Tanzanian High Court correctly held that:

> The resolution to replace the existing SADC Tribunal Protocol [2000 Tribunal Protocol] is technically law and fact, merely a proposal to amend 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* (emphasis added).[118]

Indeed, even though the 2014 Tribunal Protocol was signed, it was still subject to a parliamentary procedure that would have determined on its ratification. It is submitted that Parliament under the "new dawn" was unlikely to approve the 2014 Tribunal Protocol when a highest Court in South Africa had already pronounced that it was adopted outside the SADC Treaty and constitutionally mandated procedure.[119]

The Court is no stranger to judicial overreach especially in cases dealing with the suspended SADC Tribunal.[120] In the *Government of the Republic of Zimbabwe v Fick and Others*, the Court applied the provisions of an unratified SADC Treaty and the 2000 Tribunal Protocol without a legal basis. It is submitted that this too, amounted to judicial overreach in that the Court legislated on behalf of the legislature by applying the provisions of unratified treaties

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the issue of separation of powers. The majority decision delivered by Jafta J directed the National Assembly to comply with section 237 of the Constitution and enact rules regulating the removal of a president in terms of section 89 of the Constitution without delay. The minority judgment delivered by Mogoeng J took a different view and concluded that the "judgment [majority] is a textbook case of judicial overreach - a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament." This highlights the difficulties faced by the Court about how far it can go to hold a particular branch of a government accountable in a given case. See De Wet "Judicial Overreach is Back" https://mg.co.za/article/2017-05-19-00-judicial-overreach-is-back/ (17-04-2020).

114 2012 (4) SA 618 (CC) 95.

115 *Law Society* of *South Africa* and *Others v President* of the *Republic* of *South Africa* and *Others;* Nevin "SADC Tribunal Paid the Price for Threatening States' Authority" 97.

116 *Ibid.*

117 *Tanganyika Law Society* 28; *Law Society of South Africa and Others v President of the Republic of South Africa & Others, Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania* 50.

118 *Ibid.*

119 The concept of a "new dawn" is referred to as the current government of President Ramaphosa that has been hailed by many as likely to bring about positive change in South Africa. *See Eskom Holdings Soc Company and Others v Trillian Capital Partners (Pty) Ltd and Others* Case No: 22877/2018 at 1.

120 *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC).

in domestic law.[121] At a closer look, it seems as if the Court somehow implies that the act of signing a treaty automatically gives rise to domestic effect.

4 CONCLUSION AND RECOMMENDATIONS

The above discussion has revealed that two SADC countries have ruled in favour of reviving the SADC Tribunal. However, the decisions do not save the SADC Tribunal but have the potential to persuade the respective governments to rethink their stance on the Tribunal and the manner in which they conduct their international relations within the SADC region. The Tanzanian High Court has even gone to the extent of indicating that it will, pending the operation of the Tribunal, continue receiving cases that deals with disputes between Tanzanian citizens and her Government. This is something that the Constitutional Court of South Africa did not pronounce, but a possibility to receive such cases cannot be ruled out given the South African Court's stance on the SADC Tribunal. The Tanzanian High Court decision is welcomed as it further provides a form of temporary access to the SADC Tribunal in the form of domestic courts. The Constitutional Court of South Africa's decision is also important as it demonstrates the Court's ability to utilise the constitutional principles to hold the President accountable when conducting international relations that have a bearing on South African citizens in so far as access to regional justice is concerned.

It appears that the strategy of civil society in each SADC country to approach the domestic courts of every SADC Member State has provided some form of relief and hope to rescue the SADC Tribunal. This is evident from the impact of both the South African Constitutional Court and the Tanzanian High Court judgments. It is reported that a similar case was unsuccessfully instituted before the courts of Mozambique by a local NGO.[122] Consequently, Lungo has reported that the strategy of pursuing the legal route through NGOs or law societies of different countries has been abandoned on the basis that the legal route throughout SADC countries is going to take longer.[123] Further, the different rules of procedure on both civil and common-law jurisdictions are more likely to be difficult to pursue the challenge based on judicial review.[124] Accordingly, the civil society is now considering lobbying the ministries of justice to put the SADC Tribunal matter on the agenda for future discussion with the hope of it gaining favourable support in the form of political will from SADC leaders. Ultimately, it is recommended that SADC leaders should seriously consider their decision of disbanding the SADC Tribunal and strive for consensus in ensuring access to justice at a regional level through reviving the tribunal.

121 Phooko "Legal Status of International Law in South Africa's Municipal Law: Government of the Republic of Zimbabwe v Fick and Others" (657/11) [2012] ZASCA 122, 2014 (22) *AFR. J. INT. COMP. LAW*. 403–406.

122 *Law Society of South Africa and Others v President of the Republic of South Africa and Others*, Nevin "SADC Tribunal Paid the Price for Threatening States' Authority".

123 Ammann *Domestic Courts and Interpretation of International Law*.

124 *Ibid*.