

Is the SADC Tribunal under judicial siege in Zimbabwe? Reflections on *Etheredge v Minister of State for National Security Responsible for Lands, Land Reform and Resettlement and Another*

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Abstract

Following a decision of the High Court of Zimbabwe that the SADC Tribunal is not recognised in the Zimbabwean Constitution as superior to the national courts in Zimbabwe, there was an outcry in sections of the media and civil society that the decision had undermined the regional tribunal. This contribution analyses the ‘offending’ pronouncements in the High Court decision from an international law perspective. Focusing on the relationship between international law and Zimbabwean law on the one hand, and the relationship between proceedings in international tribunals and national legal proceedings on the other, this contribution critiques the view that the decision of the Zimbabwe High Court undermines the SADC Tribunal. Applying the effect of the dualist- monist debate on the relationship between international law and municipal law, this contribution argues that the decision in question does not negatively affect Zimbabwe’s responsibility at international law. However, the contribution concludes that for the sake of judicial integrity national judges should encourage respect for the decisions of international tribunals as far as this is possible within the limits of national constitutions.

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BACKGROUND

To contextualise the issues arising from the decision of Judge Gowora in *Richard Thomas Etheredge v The Minister of State for National Security Responsible for Lands, Land Reform and Resettlement and another* (the *Etheredge* case),¹ it should be noted that the applicant in this case was also the nineteenth applicant in *Campbell and 78 others v Zimbabwe* (the *Campbell* case), a matter that was heard and disposed of by the SADC Tribunal (the Tribunal).² In the *Campbell* case, the applicants had commenced the action seeking orders, among others, to restrain the government of Zimbabwe from removing them from certain parcels of land in various locations in Zimbabwe. The applicants also claimed that Zimbabwe had violated several of their rights, including the right not to be discriminated against as guaranteed under the Treaty of the Southern Africa Development Community (SADC).³ Ruling on an interim application for provisional measures of relief, the Tribunal made several orders in favour of the applicants pending the final determination of the matter.⁴ Subsequently, on the substantive issues, the Tribunal also found in favour of the applicants holding that Zimbabwe had violated the applicants' right not to be discriminated against and the right of access to justice. It was while these processes were still underway that the *Etheredge* case was commenced before the High Court of Zimbabwe in Harare.

In the *Etheredge* case, the first respondent was the Minister of State for National Security Responsible for Lands, Land Reform and Resettlement and the second respondent was one Senator Edna Madzongwe. The action, however, did not proceed as against the first respondent and only proceeded as regards the second respondent. Admittedly, like the *Campbell* case, the *Etheredge* case also revolved around the 'controversial' land reform programme of the Zimbabwean government. We shall not, however, concern ourselves with the High Court's findings with respect to the parties' rights under the land reform programme and the merits of the applicant's

¹ *Etheredge v The Minister of State for National Security Responsible for Lands, Land Reform and Resettlement and Another*, HC 3295/08 (Unreported).

² *Campbell (Pvt) Ltd and others v Zimbabwe*, SADC (T) Case 2/2007 in which judgment was delivered on 28 November 2008.

³ The Treaty of SADC was signed in Windhoek, Namibia on 17 August 1992 but was amended in 2001. The current member states of SADC are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Namibia, Mozambique, Swaziland, South Africa, Tanzania, Zambia and Zimbabwe. The Treaty is available at <http://www.sadc.int/index> (last accessed on 11 Apr 2009).

⁴ *Campbell and Another v Zimbabwe* (Campbell interim 2007), SADC (T) Case 2/2007, ruling of 13 December 2007, 2.

application thereunder, but shall instead focus on the parts that we perceive to have implications for international law.

Notably, the international law dimensions to the *Etheredge* case were not brought to the court's attention by the applicant. As is evident from the judgment, it is the second respondent who raised two matters that triggered the discussion about the SADC Tribunal and international law generally.⁵ First, the second respondent argued that the applicant was not entitled to the remedies he was seeking as he and other farmers had a similar matter before the SADC Tribunal. In essence, the second respondent contended that by virtue of the principle of *lis pendens*, the High Court of Zimbabwe could not be seized of the matter. Secondly, the second respondent also argued that the High Court could not entertain the matter because it lacked jurisdiction as the same matter had already been considered and adjudicated on by the SADC Tribunal. The second limb of the argument may be connected to the provisional measures order by the SADC Tribunal in favour of the applicants in the *Campbell* case. We note the interconnectedness between the submissions that were made by the second respondent and take the view that these raise issues not just of *lis pendens*, but also *res judicata*, among others.

On the second respondent's submissions, the judge came to the conclusion that the SADC Tribunal Protocol⁶ does not establish the Tribunal as a court of superior jurisdiction in the territories of the SADC member states. According to the judge, the Zimbabwean Constitution, which is the supreme law in Zimbabwe, establishes the High Court as a court of superior jurisdiction with inherent jurisdiction over all people and all matters. This jurisdiction had not, according to the judge, been ousted by the SADC Tribunal Protocol or any other statute.⁷ It is clear to us that the judge was saying that on a point of hierarchical ordering, the SADC Tribunal was not superior to the Zimbabwe High Court. Further, the judge also held that the submission of *lis pendens* would not succeed before the High Court as her perusal revealed that the nature of the relief that the applicant and his fellow farmers sought before the SADC Tribunal was substantially different from the relief that the applicant was seeking before the Zimbabwe High Court.

⁵ See the *Etheredge* case n 1 above at 9.

⁶ The Protocol of the Tribunal and the Rules of Procedure thereof (adopted in 2000). Available at: <http://sadc.int/English/documents/legal/protocols/tribunal.php?media=print> (last accessed 14 April 2009).

⁷ See *Etheredge* case n 1 above at 9.

It is the judge's comments pertaining to the SADC Tribunal that have drawn the ire of some commentators.⁸

THE ISSUES ARISING FROM THE JUDGMENT

From the point of view of international law, Judge Gowora's *dicta* can potentially warrant assessment on three different fronts. First, there is the question of the relationship between international law and Zimbabwean municipal law. Secondly, there is the question whether proceedings in international judicial or quasi-judicial fora constitute a bar to an action in municipal courts, either on the basis of *lis pendens* or on grounds of *res judicata*. Thirdly, there is also the question of the nature of the relation between international courts (in this case the SADC Tribunal) and municipal courts (in this case the Zimbabwe High Court) in terms of hierarchy, precedence, and effect of decisions.

As part of the context against which an analysis of the *Etheredge* case will be conducted, it is important to appreciate two further points. First, the action before the SADC Tribunal was against the state of Zimbabwe, whereas in the High Court, the action was against an individual in her individual capacity. Although the government of Zimbabwe was cited as the first respondent, it did not participate in the litigation and no relief was sought against it. Secondly, the action in the High Court was to challenge acts of spoliation allegedly authorised by the second respondent, while before the SADC Tribunal, the challenge was against the compulsory acquisition of several parcels of land by the government of Zimbabwe. While it may be conceded that the land acquisition is connected to the claim for spoliation, the two claims are substantially different both in terms of the relief sought and as regards the parties before the two judicial fora. Against this background, we shall now analyse the import of the supposedly 'offending' dicta by Judge Gowora.

⁸ Media reports indicate that the decision in the *Etheredge* case was slammed as 'ludicrous'. The general assumption being that the decision was in effect nullifying the earlier decision of the SADC Tribunal. The High Court decision has also been referred to as 'a true reflection on the complete breakdown of governance and adherence to the rule of law that exists in Zimbabwe now' – See Alex Bell 'Farmers slam "ludicrous" court decision to nullify SADC Tribunal ruling' available at: <http://allafrica.com/stories/200903040817.html> (last accessed on 16 April 2009).

The relationship between international law and Zimbabwean municipal law

One of the enduring debates in international law relates to the relationship between international law and municipal law. As is commonly known, this debate largely centres on whether international law and municipal law form a single system in which one legal order can claim superiority over the other, or whether they exist as separate entities.⁹ While monism takes the view that international law and municipal law form part of a single legal order in which international law is superior,¹⁰ dualism does not see a single legal order but two different legal orders regulating different subject matters.¹¹

Coming from a dualist background where constitutional supremacy is also regarded as sacrosanct, Gowora J would naturally be a loyalist of the view that international law and municipal law is each supreme in its individual sphere of operation.¹² The judge states categorically that ‘[t]he supreme law in this jurisdiction is our Constitution and it has not made provisions for these courts to be subject to the Tribunal’.¹³ In our view, a dualist interpretation accommodates the dictum of the Judge and there is nothing fundamentally wrong with her position. It must be recalled that within the sphere of domestic or municipal law, for the purpose of regulating the relations between individuals and between individuals and the state, it is municipal law and municipal legislation that applies. As Brownlie notes, from the perspective of dualism, even when municipal law allows for partial or full application of international law within a domestic legal system, that application is ‘merely an exercise of the authority of municipal law’.¹⁴ Consequently, from the dualist view, to which it is apparent Zimbabwe

⁹ DJ Harris *Cases and materials on international law* (2004) 66.

¹⁰ Two variants of monism are discernible. The first variant is propounded largely by the German scholar JJ Moser, who asserts that national law subsumes and prevails over international legal rules which are but ‘external state law’. Under this view international law proper did not exist, for it was made up of the ‘external law’ of the various members of the international community. This view thus advocated for a single set of legal systems – the domestic legal orders and denied the existence of international law as a distinct and autonomous body of law. This view has since lost appeal and is not often invoked. The second variant of monism advocates the primacy of international law and was first advocated by W Kaufmann but was more comprehensively propounded by H Kelsen. Under this view international and municipal systems are part of the same legal order – A Casese *International law* (2005) 213–220.

¹¹ See I Brownlie *Principles of public international law* (2003) 31–32.

¹² Very telling on this point is section 111B of the Constitution of Zimbabwe which expressly subjects international treaty law to parliamentary approval before the same can be applied in the country.

¹³ See the *Etheredge* case n 1 above at 9.

¹⁴ Brownlie n 11 above at 32.

belongs, it is the Constitution of Zimbabwe that determines the status of international law and institutions of international law within the legal order. This, therefore, should not be a major issue. The more important issue is whether such a dualist orientation implies that the state of Zimbabwe escapes her international law obligations simply because of her dualist legal tradition. It is our contention that Zimbabwe does not escape its international obligations thereby and we do not think that Judge Gowora suggests anything different.¹⁵

Restating the arguments of Sir Gerald Fitzmaurice which he terms ‘theories of coordination’, Brownlie stresses that international law and municipal law ‘do not come into conflict as systems since they work in different spheres. Each is supreme in its own field’.¹⁶ If Brownlie is correct, and we think he is, Judge Gowora was/is entitled to adhere to and uphold the Constitution of Zimbabwe to which her court owes its jurisdiction. However, the question of Zimbabwe’s international obligations is another matter altogether as it is not affected by whatever is contained in the Zimbabwean Constitution or any other municipal law for that matter. Again, as Brownlie notes, even though each legal order is supreme in its sphere, there may be a conflict of obligations that arises where a state is unable to comply with international law in its conduct within the municipal system. In this situation, ‘the consequence of this will not be the invalidity of the internal law but the responsibility of the state on the international plane’.¹⁷ In the present context, Judge Gowora cannot disregard the Zimbabwean Constitution in favour of the SADC regional international law. The SADC international law does not invalidate the Zimbabwean Constitution but merely ignites Zimbabwe’s obligations under SADC law.

Notwithstanding the brief theoretical position laid out above, it is necessary to ask whether the dicta by Gowora J, and indeed the entire decision,

¹⁵ The basic principle here is that a state cannot invoke provisions in its domestic laws to escape its obligations under international law. This principle is reiterated in article 27 of the Vienna Convention on the Law of Treaties, 1969, reprinted in M Evans *Blackstone’s international law documents* (1991) 138. The United Nations treaties data base indicates that Zimbabwe is not a party to the Vienna Convention on the law of treaties. See: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=IND&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en (last accessed on 17 June 2009). However, even if Zimbabwe is not a party, it is arguable that most of the rules contained in the Vienna Convention on the Law of Treaties are a mere codification of customary international law in so far as pertains to treaty interpretation and application – M Akehurst *A modern introduction to international law* (1992) 123.

¹⁶ Brownlie n 11 above at 32.

¹⁷ *Id* at 33.

represents a challenge to SADC (regional) international law. In our view, it does not. Judge Gowora did not say that Zimbabwe does not have obligations under SADC law. She merely observed that there is nothing in either the SADC Tribunal Protocol or the Zimbabwean Constitution that suggests inferiority of her court (and the national courts of SADC countries) to the SADC Tribunal. In other words, had there been such a provision either in the Protocol or in the national Constitution, she would have found herself obliged to comply. To our mind, that suggests a willingness to respect the provisions of the SADC Tribunal Protocol to the extent that it contains express provisions on the given subject matter.

Do proceedings in an international fora act as *lis pendens* or *res judicata* with relation to proceedings in a municipal court?

Lis alibi pendens (*lis pendens*) simply means that there is a law suit pending before another tribunal.¹⁸ Practically, the rule operates to prevent a court from being seized of a matter that is already being considered by another court where the parties and the issues are substantially the same. Generally, *res judicata* refers to an issue that has been settled definitely by judicial decision. Specifically, *res judicata* operates as an affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions that could have been, but was not raised in the first suit. The three essential conditions that must be present before *res judicata* can validly be invoked are, first, an earlier decision on the issue, second, a final judgment on the merits, and third, the involvement of the same parties, or parties in privity with the original parties.¹⁹

The rules pertaining to *res judicata* and *lis pendens* raise serious issues when one considers the relationship between international tribunals and municipal courts. It seems different positions have emerged as regards *lis pendens* and *res judicata*. In relation to *lis pendens* as a principle of international law, Shany argues that the practice of applying the *lis pendens* rule by international courts *vis-à-vis* domestic court proceedings is too sparse to be conclusive.²⁰ Shany reasons that the inconclusive nature of the theory and practice pertaining to the *lis pendens* rule in relation to parallel proceedings in national and international fora, ‘invites the conclusion that no hard and

¹⁸ *Black’s law dictionary* (1999) 942.

¹⁹ *Id* at 1312.

²⁰ Y Shany *Regulating jurisdictional relations between national and international courts* (2007) 158.

fast rule of international law on the matter appears to exist'.²¹ A totally different position seems to have emerged as regards *res judicata*. *Res judicata* has long been considered an established principle of international law.²² The binding nature of the *res judicata* rule seems to have emerged from the centuries-old practice by states of attributing 'final and binding' effect to arbitral awards and other international judicial decisions. It is arguable that the *res judicata* rule has evolved into a rule of customary international law judging from the consistent and widespread state practice on the issue, plus the pervasive sense of legal obligation on the part of states.²³ Other jurists, however, have been content to accept that the *res judicata* rule represents a general principle of international law that can be validly applied by international tribunals.²⁴

On the question whether proceedings before international judicial or quasi-judicial fora constitute either *lis pendens* or *res judicata*, it is, as pointed out above, very difficult to assert any straightforward legal rule or theory. However, it would appear that practice and limited opinion on the subject does not point to a regime under which international proceedings will affect national judicial proceedings. On this point, Shabtai Rosenne expresses the opinion that 'The principle of the independence of the judiciary makes it difficult if not impossible for a decision of an international court or tribunal to impose an obligation directly on an internal tribunal unless the national legislation makes provision for this'.²⁵ Brownlie for his part, holds the view that 'In principle, decisions of organs of international organisations are not binding on national courts without the cooperation of the internal legal system ...'.²⁶ He adds further that 'a decision of the International Court, though it concerns substantially the same issues as those before the municipal court, does not of itself create a *res judicata* for the latter'.²⁷

In our view, practice coincidentally supports the views expressed by the above cited authors. It is commonly accepted that the requirement that local

²¹ *Id* at 159.

²² Y Shany *The competing jurisdictions of international courts and tribunals* (2003) 245–246.

²³ *Ibid.*

²⁴ For example, *Chorzow Factory Case* 1927 PCIJ (Ser A) No. 13 at 27 (interpretation). (Dissenting opinion of Judge Anzilotti): 'It appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to "general principles of law as recognised by civilised nations" ... that case is assuredly the [case of *res judicata*].'

²⁵ S Rosenne, *The perplexities of modern international law* (2004) 66.

²⁶ Brownlie n 11 above at 51.

²⁷ *Ibid.*

remedies must be exhausted is an essential part of most international judicial or quasi-judicial systems.²⁸ In effect, by requiring that local remedies be exhausted, international legal practice effectively seeks to avoid the challenge of *lis pendens* occurring between national courts and international tribunals. If a matter has been conclusively treated within the national system, even without the interference of international law and its mechanisms, the principles of *res judicata* in municipal law would apply to prevent a re-opening of the case before another municipal tribunal. If such a matter then comes before an international tribunal, after the exhaustion of domestic remedies, *res judicata* would not even apply during its consideration. In this context, therefore, issues of *lis pendens* and *res judicata* as between national courts and international fora would not even arise.

In the present situation, if the facts of the *Etheredge* case before Judge Gowora were before another municipal court in Zimbabwe, the *lis pendens* rule would have applied to prevent Judge Gowora from entertaining the action. In the circumstances of the *Etheredge* case before Judge Gowora, the *lis pendens* rule could not have applied and we agree with her finding in this regard. In as far as the judge's comments on the SADC Tribunal are concerned, we think she reiterated nothing more than the obvious by stating that the SADC Tribunal is not a recognised judicial forum under Zimbabwean law. We do not think that the intention of the judge was to deny recognition to the SADC Tribunal as she clearly recognised the Tribunal to be a judicial forum, but was rather interested in the hierarchical relation it has with national courts such as her court. Was she right then in holding that the SADC Tribunal proceedings do not oust her jurisdiction? In our view, she was. First, as we have demonstrated above, the limited available opinion in this regard is that international proceedings do not act as ouster of jurisdiction where a national court should ordinarily have jurisdiction. Secondly, and very fundamentally in this case, because the issues and parties before the court and the Tribunal were not the same, the questions of *lis*

²⁸ For example, see art 56(5) of the African Charter on Human and Peoples Rights, 1981, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 29. One of the few exceptions being the ECOWAS Community Court in respect of its human rights mandate. By art 10 (d) (ii) of the 2005 Supplementary Protocol on the ECOWAS Court, there is no requirement to exhaust local remedies before the court is seized on human rights issues.

pendens and *res judicata* could not arise.²⁹ The submission made to Judge Gowora on *lis pendens* and *res judicata* was, with due respect, misconceived.

The debate arising from Judge Gowora's judgment, however, further emphasises the need for domestic proceedings to be exhausted before matters are brought before international fora. For in our view, since the Supreme Court of Zimbabwe had yet to conclude the *Campbell* case before it was decided on the merits (as distinct from the interim proceedings for provisional measures), the same case could not have been heard by the High Court of Zimbabwe by any stroke of chance. Consequently, it is our view that Judge Gowora did not do or say anything unthinkable in this regard either.

The relationship between municipal courts and international courts/tribunals

The last angle in this analysis is the question whether there is, should be, or is intended to be, any hierarchical relation between national courts and international courts in the ordinary scheme of things. As already canvassed above, national courts operate within the municipal legal system in a hierarchical structure that excludes international courts. International courts on the other hand, operate mostly in isolated own legal systems with authority over the specific issues and parties for which they were established. As they exercise jurisdiction on matters over which the national courts exercise jurisdiction, they inevitably occasionally act as 'appellate' courts over national decisions, especially in human rights cases. However, in practice international courts are not 'appellate courts' over national systems as their proceedings are in principle, considerations of the international obligations of state respondents before them. This is distinct in the sense that national courts, even where they apply international human rights law, apply such international law not as such but as national laws (after the process of incorporation or transformation).³⁰ In this regard, the relation of the international judicial fora is to the state and not to the judicial institutions of the state.

²⁹ The decision of the East African Court of Justice in *Katabazi and Ors v Uganda* (unreported suit) reference no 1 of 2007, judgement of the EACJ delivered on 1 November 2007 (available at: www.chr.upac.za/about/news_2008/EACJ) on the issue of *res judicata* is instructive in this regard.

³⁰ British practice offers clear examples of how municipal courts can apply international law by a process of incorporation although the process differs depending on whether what is to be incorporated is customary international law or treaty law – I Brownlie *Principles of public international law* (1990) 43–48.

Apart from the position above, it is rare to find international instruments containing provisions that express hierarchical relations between national courts and international courts. Hence, for example, in the development of human rights in the work of the European Court of Justice (ECJ), it is on record that it was the challenge of the German courts to the superiority of the ECJ that forced the ECJ to apply human rights standards in cases before it.³¹ In other words, as there is nothing in the European Union and the European Communities constitutions asserting the superiority of the ECJ over national courts, national courts had the liberty to exercise jurisdiction over matters where they felt the ECJ's treatment of the case had been inadequate. Similarly, the ECOWAS Community Court has asserted that it exists in an integrated relation with national courts of member states.³² In fact in the case of SADC, it is arguable that the provisions in the Protocol which require enforcement of the Tribunal's decisions as judgments of foreign courts, do not indicate any hierarchical relation.³³ From all of these considerations, it is our view that Judge Gowora was not legally wrong in her observation that there is no hierarchical relation evident in the SADC Tribunal Protocol.

FINAL REMARKS

The fundamental issue that arises from the *Etheredge* case is whether the state of the relation between national courts and international courts, as well as the principle of dualism, imply that Zimbabwe is or should not be affected by the decision of the SADC Tribunal. The answer in our view is an emphatic no. As we have demonstrated above, the international obligations of Zimbabwe are not affected by the position of her domestic laws. This much is also evident in treaty law.³⁴ As far as international law is concerned, Zimbabwe has obligations and is bound to implement the decisions of the SADC Tribunal to which she is a willing and voluntary party.

It is a fact that the jurisdictions of national courts and international tribunals do sometimes interact. The more fundamental issue, however, is for national

³¹ For a discussion on the contributions of the ECJ to the evolution of human rights in the European Union, and especially the challenges from the German courts, see Laurent Scheeck, 'The relationship between the European courts and integration through human rights' 2005 *ZaöRV* 837–885, <http://www.zaoerv.de> (last accessed 16 May 2009).

³² See the ECOWAS Court's decision in *Ugokwe v Nigeria* (unreported suit) no ECW/CCJ/APP/02/05 the ECCJ proclaimed that it is the first and last court in Community law (par 32 of the judgment).

³³ Article 32 of the SADC Tribunal Protocol states thus: 'The law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the state in which the judgment is to be enforced shall govern enforcement.'

³⁴ Art 26 of the Vienna Convention on the Law of Treaties.

courts on their part, to regulate this interaction in a manner that does not negate the state's obligations under international law. For the sake of judicial integrity and judicial ethics, national judges should encourage respect for decisions of international courts in as far as this is possible within the limits of national law. As Brownlie puts it, 'it does not follow that a municipal court could not, or should not recognise the validity of the judgment of an international tribunal of manifest competence and authority, at least for certain purposes'.³⁵

We do not think that Judge Gowora has suggested that Zimbabwe should not comply with the decisions of the SADC Tribunal. Nor do we think that the judge can or should challenge the competence of the Tribunal with respect to Zimbabwe. It is our further view that the essence of the dicta of the judge is simply that the existence of international proceedings did not, in the *Etheredge* case, automatically oust the jurisdiction of national courts on the basis of either *lis pendens* or *res judicata*. The normal requirements for the application of such principles must be established before they can apply. Similarly, the dictum is a formulation of the classic theory of dualism which in itself does not affect the responsibility of a state at international law, or the efficacy of international judicial and quasi-judicial proceedings. It should, therefore, not be used as a tool to challenge the authority of SADC regional international law as this is, obviously, not the intention of the *dicta*.

³⁵ Brownlie n 11 above at 51. See also S Rosenne n 25 above at 66–67 who gives examples of cases where national courts have held that by deliberately accepting to be part of systems with international judicial organs, a state is bound by the decisions of such international judicial organs.