Extending the life of the SADC Tribunal

Government of the Republic of Zimbabwe v Fick
2013 5 SA 325 (CC)

1 Introduction

Judgments delivered by the South African Constitutional Court on questions of international law always arouse great interest. One reason for this is that the Constitutional Court has decided relatively few cases on international law. Fortunately this is changing rapidly. The case of *Government of the Republic of Zimbabwe v Fick*[1] has made a dramatic contribution to the way in which the South African courts treat foreign case law. In *Fick* the South African Constitutional Court dealt a blow to the government of Zimbabwe when, in a

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[157] *Id* 9.
[1] *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC).

unanimous decision it ruled that property in South Africa owned by the Zimbabwean government could be sold to defray legal expenses in a human rights case. This note will highlight some of the unusual aspects of the *Fick* case and the extent to which the case has developed international law, something that has received relatively little scholarly attention but has made a powerful contribution to our jurisprudence.

The *Fick* case involved the enforceability of the decisions of the Southern African Development Community Tribunal (SADC Tribunal) under the Protocol of the SADC Tribunal which is binding on South Africa by way of the SADC Treaty. This was the first time the Constitutional Court was confronted with the question of the status of international decisions in a domestic court.[2] The case was also unique in the sense that the SADC Tribunal is a subregional court and the status of subregional case laws have never before been addressed by the Constitutional Court. The case was unusual in the sense that it does not happen often that the South African courts are approached to enforce a foreign decision which South Africa is *obliged* to enforce under its treaty obligations. Both South Africa and Zimbabwe signed the Amended SADC Treaty on 14 August 2001, so binding themselves to its terms. The Amended SADC Treaty has, however, not been transformed into South African law. The fact that the Constitutional Court nevertheless used the Amended SADC Treaty as a basis for its decision to the extent of even developing the common law to give effect to its treaty obligations, is significant.

2 The *Campbell* case

As the *Fick* case involved enforcing the decision of the SADC Tribunal in the *Mike Campbell* case, the *Fick* case cannot be understood without considering the *Campbell* case. Oppong observes that the Campbell case was possibly the most controversial case to be decided by a regional economic community in Africa.[3] In *Campell*, the SADC Tribunal confronted the question of land redistibution and so-called 'land grabs' in Zimbabwe.[4]

In a nutshell, the *Campbell* case involved 79 white Zimbabwean commercial farmers who took the Zimbabwean government to the SADC Tribunal in an effort to block the compulsory acquisition of their farms by the Mugabe government (colloquially termed 'land-grabbing').[5]

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[2] De Wet 'The case of *Government of the Republic of Zimbabwe v Louis Karel Fick*: A first step towards developing a doctrine on the status of international judgments within the domestic legal order' (2014) 17 *Potchefstroom Electronic Law Journal* 554.
[3] Oppong 'Enforcing judgments of the SADC Tribunal in the domestic courts of members states' (2010) *Monitoring Regional Integration in Southern Africa Yearbook* 115.
[4] Swart 'Alternative fora for human rights protection? An evaluation of the human rights standards of the African sub-regional courts' (2013) *Journal of South African Law* (*TSAR*) 3.
[5] See the description available at www.hrw.org/news/2011/08/11/sadc-qa-tribunal.

The government of Zimbabwe, despite being a member of SADC, amended its Constitution to cater for compulsory acquisition without compensation by the state of all agricultural land identified by the state's acquiring authority. Because of the lack of domestic remedies afforded to the affected farmers, the agrarian reform policy was challenged before the SADC Tribunal.

The first applicant, Mike Campbell, filed his case in October 2007 contesting the seizure of his mango and citrus farm by the government.[6] He contended that the seizure was illegal and racist and that it violated the SADC Treaty.[7] He approached the Tribunal after having exhausted all domestic remedies. The Zimbabwean Supreme Court made an unfavourable ruling against him in January 2008. The court came to the conclusion that the compulsory acquisition of farmland in Zimbabwe did not constitute 'racial discrimination' as the text of applicable law made no reference to race or colour. [8]

Subsequent to the SADC Tribunal's ruling in Mike Campbell's favour, the Zimbabwean government refused to enforce the ruling and challenged the validity of the Tribunal. In the *Gramara* case, Judge Patel of the High Court of Zimbabwe declined the application to register the SADC decision for purposes of enforcement.[9] He held that although the Tribunal was properly constituted and had jurisdiction to hear the case, its decision could not be registered as it was contrary to public policy (*ordre public*).[10] He held that the Supreme Court of Zimbabwe had confirmed the constitutionality of the land reform programme, and that registering the case in Zimbabwe would undermine the Supreme Court's authority. The court also stated that the SADC Tribunal conflicted with the Zimbabwean Constitution, and that the Constitution was the supreme law of the land.[11]

The controversy triggered by the *Campbell* case led to the suspension of the SADC Tribunal. The SADC summit announced in 2012 that a protocol for a new tribunal would be negotiated and its jurisdiction would be limited to the

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[6]*Mike Campbell (Pty) Ltd v Republic of Zimbabwe* (Case no 2 of 2007). Campbell simultaneously asked for interim measures to protect him and his property. The SADC Tribunal granted the interim measures in a decision on 13 December 2007.

[7]As above IV.

[8]Supreme Court of Zimbabwe, *Mike Campbell (Pty) Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement* (124/060 [2008] ZWSC 1 (22 January 2008) available at http://www.saflii.org/zw/cases//ZWSc/2008/1.html.

[9]*Gramara (PRIVATE) Limited and Colin Bailie Cloete v Government of the Republic of Zimbabwe and Attorney General of Zimbabwe and Norman Kapanga (Intervener)*, Opposed Application, Harare, 24 November 2009 and 26 January 2010.

[10]In the Decision of 26 January 2010 the High Court of Zimbabwe declined the application to register the SADC decision for purposes of enforcement. Note 9 above.

[11]As above.

adjudication of disputes between member states. The 2012 decision to shut down the SADC Tribunal raised a fundamental question as to whether the decisions of the SADC Tribunal were binding and enforceable. Since the SADC Tribunal was the only avenue by which to access justice for many Zimbabweans and individuals from other countries, the status of its findings prior to foreclosure are an essential bulwark against the overwhelming power that the Zimbabwean government has assumed in bullishly implementing its contested and divisive land reform programme.[12]

3 The *Fick* case

As a result of the *Campbell* decision, Zimbabwe was ordered to protect the ownership, occupation and possession rights of the farmers who had not yet been evicted and to compensate those who had.[13] This was met with a complete lack of compliance from Zimbabwe, and was then referred back to the Tribunal by the farmers. The Tribunal then referred the matter to the Summit and imposed a costs order against Zimbabwe. Again Zimbabwe did not comply.[14]

The North Gauteng High Court was approached. Zimbabwe argued that it was immune from the jurisdiction of civil courts in South Africa. In a progressive judgment, the High Court considered that the Immunity Act must be interpreted to promote the spirit, purport and objects of the Bill of Rights, and that it is required to consider international law in terms of section 39(1)(b) of the Constitution. The court stated that the old doctrine of absolute immunity had yielded to a restrictive doctrine, including in relation to human rights issues, but did not elaborate on the significance of this for the present case. The court found that section 3(2) of the Foreign States Immunity Act provides for a waiver of immunity 'by prior written agreement', and that a treaty is indeed a prior written agreement.

Tuchten AJ subsequently made a service order against Zimbabwe,[15] and a registration order,[16] which then led to the authorisation of the attachment and sale of certain Zimbabwe-owned properties in Cape Town in execution of the costs order made by the Tribunal. This progressive judgment set the tone for the subsequent litigation.

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[12]Premhid 'The SADC Tribunal lives on … kind of' *Helen Suzman Foundation* 12 July 2013 available at http://hsf.org.za/resource-centre/hsf-briefs/the-sadc-tribunal-lives-on...-kind-of.
[13]Note 1 above 14.
[14]As above 15.
[15]*Fick v Government of the Republic of Zimbabwe* Case no 77880/2009, North Gauteng High Court, Pretoria, 13 January 2010, unreported.
[16]*Fick v Government of the Republic of Zimbabwe* Case no 77881/2009, North Gauteng High Court, Pretoria, 25 February 2010, unreported.

The decision of the High Court was challenged by Zimbabwe in the Supreme Court of Appeal (SCA). The service order was challenged on the basis of Zimbabwe's immunity from civil prosecution in South Africa.[17] The registration order was challenged on the basis that the Tribunal did not have the jurisdiction over the land-reform policy, and that the High Court did not have jurisdiction to enforce the costs order because the Treaty and Tribunal Protocol had not been approved by the South African parliament.

The SCA found that Zimbabwe had waived its purported immunity by becoming a party to the Treaty, and that the Amending Agreement had been adopted by the prescribed majority.[18] In effect, the Tribunal's jurisdiction over the matter was held to be sufficient for South Africa to enforce the costs order made. The SCA stated that South Africa's common law on the enforcement of foreign judgments also applied to international tribunals, and as such the costs order was enforceable. The decision was challenged in the Constitutional Court.

When the matter reached the Constitutional Court, the court found that all of the requirements for the recognition of a foreign judgment (the definition of which the court extended to include international tribunals) had been met.

Zimbabwe argued that the Amended Treaty was not part of South African law. However, in dismissing this argument, the Constitutional Court found that as the South African parliament had approved the Treaty in 1995, both the Treaty and the Amended Treaty are binding on South Africa.

Zimbabwe further argued that Zimbabwe enjoys immunity from civil suits in South Africa under section 2 of the Immunities Act. The Constitutional Court, however, found that Zimbabwe had waived its immunity under the Act. It pointed to article 32 of the Tribunal Protocol (to which Zimbabwe had agreed to b bound) which obliges member states to facilitate the enforcement of judgments of the Tribunal, and that decisions of the Tribunal are binding and enforceable 'within the Territories of the States concerned.'

The Constitutional Court emphasised that, in accordance with section 231 of the Constitution (which governs the ratification of treaties), South Africa had become a party to those SADC instruments which obliged the country to give effect to decisions of the SADC Tribunal. In addition, the values and rights underpinning the SADC Treaty include the rule of law, which is also entrenched in the South African Constitution – *inter alia* through the right to access the courts guaranteed in section 34. 8

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[17]In terms of the Foreign States Immunities Act 87 of 1981.

[18]*Government of the Republic of Zimbabwe v Fick* 2012 ZASCA 122, 40.

In a majority judgment written by Mogoeng CJ, the Constitutional Court developed the common law on the enforcement of foreign judgments and orders to apply to those of the Tribunal. The majority held that the High Court had correctly ordered that the costs order be enforced in South Africa. The court held that this development was provided for by the SADC legal instruments on the enforcement of the decisions of the Tribunal in the SADSC region.

Mogoeng CJ also found that the objections raised by Zimbabwe with respect to the Tribunal's lack of jurisdiction to hear the matter, were without merit, given that the Tribunal's establishing Treaty was properly adopted internationally and within South Africa, and, further, that Zimbabwe had submitted to the Tribunal's jurisdiction.

A central question was whether the common law allowed for the enforcement of the decisions of an international Tribunal as a 'foreign judgment or order'.[19] In consideration of this, the court noted the requirements provided in *Purser v Sales* 1996 4 SA 411 (C) and affirmed that they do not provide for South African enforcement of the decisions of the Tribunal; as such, the common law would need to be developed accordingly.[20]

On the development of the common law, the court looked at the mischief that needed to be addressed, which it identified as 'the need to ensure that lawful judgments are not to be evaded with impunity by any State or person in the global village'.[21] The court went on to consider – in addition to article 32 of the Treaty – sections 8(3), 34 and 39 of the Constitution.[22] It decided that, within the scope of these provisions, the concept of a 'foreign court' includes the Tribunal.

The Constitutional Court went on to develop the common law in a significant manner, finding that:

> [T]he basis for objecting to the jurisdiction of a foreign court or tribunal whose order is sought to be enforced in a South African court must, in my view, be materially similar to the objections previously raised before the foreign court or tribunal that made the order to be enforced. Otherwise the objection should be dismissed.[23]

The common law requirements for the enforcement of a foreign judgment had

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[19] Note 1 above 54.
[20] As above 53.
[21] Mogoeng CJ note 1 above 54.
[22] The Constitution of the Republic of South Africa, 1996.
[23] Note 1 above 44.

therefore been met, and the domestic South African courts were deemed to have the necessary jurisdiction to register the costs order of the Tribunal.

The Constitutional Court dismissed the appeal with costs. The court concluded as follows:

> When the farmers' rights to property, their human rights in general and the right of access to courts in particular were violated, Zimbabwe was, in terms of article 6(6) of the Amended Treaty, obliged to cooperate with the Tribunal in the adjudication of the dispute. After the Tribunal had delivered its judgment, Zimbabwe was duty-bound to assist in the execution of that judgment and so is South Africa.[24]

In a brief concurring judgment, Zondo J agreed with the majority, including their position on granting leave to appeal, but held that the matter of the jurisdictional challenge dealt with in paragraphs 44 to 46 was too widely stated.[25] No alternative reasoning in dealing with the matter was given.

In an opinion written by Jafta J, he agreed that the matter raised constitutional issues, but disagreed that it was in the interests of justice to grant leave to appeal. This was on the basis that the raising of a constitutional issue alone is not sufficient for a successful application for leave to appeal in the Constitutional Court, but it must also be proved that it is in the interests of justice to do so.[26] Jafta J stated that since this second requirement had not been fulfilled by Zimbabwe, leave to appeal should not have been granted *ab initio*.[27]

4 Analysis

In *Fick* both the SCA and the Constitutional Court held that section 39 (2) of the Bill of Rights stated that South African courts are required to develop the common law on the enforcement of foreign judgments to include the enforcement of decisions of the SADC Tribunal. The Constitutional Court came to a similar conclusion in *Glenister*.[28] The fact that the SADC Tribunal was binding on South Africa and included the obligation to 'take forthwith all measures necessary to ensure execution of decisions of the Tribunal'[29] when

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[24]Note 1 above 71
[25]Note 1 above 44-46.
[26]Note 1 above 77.
[27]Note 1 above 76-105.
[28]*Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC); also see the written submissions of the first to fourth *amici curiae* in *National Commissoner of South African Police Service v Southern African Human Rights Litigation Centre* CCT 02/14, 19 May 2014.
[29]Note 1 above 59.

considered in light of the constitutional right to access to courts,[30] was crucial to this court's decision that the spirit, purport and object of the Bill of Rights required the common law to be developed in this way.[31] Moseneke DCJ and Cameron J stated in *Glenister II* that section 233 'demands any reasonable interpretation that is consistent with international law when legislation is interpreted.'[32] A similar result, giving domestic effect to untransformed treaty obligations by way of section 233 was reached in *Fick*. As de Wet obeserves, the common law remained the only possible avenue through which the SADC Tribunal's decision could be enforced in South Africa.[33] Interestingly, de Wet points out that the Constitutional Court has used international law as a tool for interpreting the common law before, notably in the case of *Carmichele v Minister of Safety and Security* 2001 ZACC 22. Relying, *inter alia*, on the Convention on the Elimination of All Forms of Discrimination against Women (1979), the court developed the law of delict to include a duty on the state to prohibit and prevent all gender-based discrimination that impairs the fundamental rights of women.[34]

The Constitutional Court in *Fick* held that:

> Analogous to the reasoning in *Glenister* … South Africa's obligation to develop the common law as a measure necessary to execute the Tribunal's decision 'is a duty the country itself undertook when it acceded to these international agreements. And it is an obligation that became binding on the Republic, in the international sphere, when the National Assembly and NCOP by resolution adopted them.[35]

Another unusual aspect of the case is that the Constitututional Court was confronted with whether or not an international decision in the form of a cost order of the SADC Tribunal, could fit the definition of a 'foreign judgment' as recognised by the South African common law. The court decided that such a decision can indeed be an international decision. The court came to this conclusion after relying on those clauses in the Constitution that committed South Africa to the rule of law, as well as its obligations under international law, and to an international law-friendly interpretation of domestic law.

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[30]Section 34 of the Constitution of the Republic of South Africa, 1996.
[31]'A[n] important factor is that certain provisions of the Constitution facilitate the alignment of our law with foreign and international law… Article 32 of the Tribunal Protocol is an offshoot of the Amended Treaty that binds South Africa' n 1 above 57-58.
[32]*Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 202.
[33]De Wet n 2 above.
[34]Botha 'The role of international law in the development of South African common law' (2001) *SAYIL* 253, 259.
[35]Note 1 above 67.

The significance of the *Fick* case reaches far beyond the narrow legal question of whether decisions of the SADC Tribunal can be enforced in South Africa. It highlights the question of the enforcement of international decisions in domstic courts, as well as the status of such decisions in domestic courts. Whereas SADC states currently have regimes for enforcing judgments from foreign national courts, they do not have regimes for enforcing the judgments of international courts.[36] It is crucial that the progressive decisions issued by sub-regional and regional human rights courts should not have purely symbolic value but should be enforceable in domestic courts in Africa.

The legal team in the *Fick* case, led by Jeremy Gauntlett SC, is currently challenging the decision by SADC heads of state to suspend access by individuals to the SADC Tribunal (as a means of access to the African Court at Arusha), before the African Commission.

5 Conclusion

It is commendable that the South African Constitutional Court took sub-regional jurisprudence seriously enough to develop our common law to allow for the implementation of such decisions. The conclusions in *Fick* will also apply to the jurisprudence of other subregional courts in Africa, such as the ECOWAS Community Court of Justice (ECCJ) and East African Court of Justice (EACJ). Whereas the EACJ has only issued a handful of cases, the ECCJ is a particularly active and productive court.[37] The South African Constitutional Court can potentially benefit from citing the jurisprudence of the ECCJ and other subregional courts. The rulings of such courts and tribunals can be used to make more effective demands against governments for human rights protection.[38]

The *Fick* case is of particular importance because it empowers the Constitutional Court itself. The Constitutional Court should be much more proactive in citing and promoting international law in carrying out its obligation in terms of sections 39 and 233 of the Constitution. In future, the *Fick* case will help the court circumvent technical arguments that a law or treaty has not been domesticated and can therefore not have binding effect in South Africa.

By elevating the status of foreign decisions in South Africa, the *Fick* decision

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[36] De Wet n 2 above; article 32(1) of the Protocol on the SADC Tribunal.
[37] See Alter *et al* 'A new International Human rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *American Journal of International Law* 737-779.
[38] See Howse and Teitel 'Beth Simmons's mobilizing for human rights: A 'beyond compliance' perspective' (2012) *Journal of International Law and Politics* 814.

can potentially have exciting consequences. It can open the door for the recognition of foreign decisions in South African courts. This development is long overdue.

The *Fick* case extends the life of the SADC Tribunal. The effect of the Constitutional Court judgment is that whilst the SADC Tribunal may no longer exist, its decisions are binding and can been enforced in South Africa.[39] Until such time as the SADC Tribunal is resuscitated, the small number of human rights decisions it has delivered will live on in this way.

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[39]Premhid n 12 above.
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