



SADC'S REGIONAL HUMAN RIGHTS COURT TIME LINE: THE RISE AND FALL OF THE SADC TRIBUNAL

1992: 17 August, 1992, the Heads of State or Government of the Southern African Development Community (SADC) concluded the Institutional Treaty of the Southern African Development Community (SADC). The SADC Tribunal was established as one of the Institutions in Article 9 (g) of the Treaty.

2005: The SADC Heads of State appointed the Members of the Tribunal during their Summit held in Gaborone on 18 August 2005.

2005: The swearing in of the Members took place on 18 November 2005 in Windhoek.

With the launch of the SADC Tribunal, individuals had the right to bring cases against their governments before the court when all efforts to achieve justice within their own countries had failed. Such person need not be a citizen of a Member State.

2007-2010: During the period that the SADC Tribunal was operational it adjudicated in 18 disputes. Cases tended to fall within one of three categories:

1. Individuals versus SADC itself (employment disputes);
2. Incorporated companies versus national governments (commercial disputes), and
3. Individuals versus national governments (human rights cases).ⁱ

The majority of cases involved individuals taking the Zimbabwe Government to court and, not surprisingly, it lost every single case.

2010: In August 2010, the SADC Summit resolved to suspend the SADC Tribunal following Zimbabwe's refusal to honour its rulings on the land grab campaign.

2010: In December 2010, the Tribunal ordered the Zimbabwe Government to pay compensation to nine victims of torture who suffered at the hands of the army and police.

2011: In May 2011 at their Summit at the Victoria Falls in Zimbabwe, the SADC Heads of State illegally suspended the SADC Tribunal and the judges were unilaterally dismissed.

Consequently:

- The Tribunal was now defunct and pending cases could not be heard.
- No new cases could be brought by individuals against their governments.

2011: On 11 July 2011 in Johannesburg, the former judge president of the Southern African Development Community Tribunal, Justice Ariranga Pillay, said SADC's bid to replace the Tribunal was illegal and undermined the principles of human rights and access to justice. He said the decision sent *"the worst possible signal" to potential investors, donors and the international community...*

2011: On 28 July 2011, a regional legal consultative meeting was held in Johannesburg, co-hosted by the International Commission of Jurists, the SADC Lawyers' Association and the Southern Africa Litigation Centre, to discuss the suspension of the Tribunal and the way forward.

2012: March: In a report dated 19 March 2012, Austin Muneke, Executive Secretary of the Southern Africa Trade Union Coordination Council (SATUCC), said: *"A disturbing trend in the SADC region is that human rights violations are on the increase, slowly overshadowing the gains made by the winds of democratic change sweeping across the region. This trend is not acceptable in a region that claims to be premised on the principles of human rights, democracy and the rule of law. The recent arbitrary suspension of the SADC Tribunal by SADC Heads of State is a dangerous precedent and a direct assault on the people of SADC and their only hope to the social justice. The trade union movement in the region has a duty to defend citizens' rights."*

May 2011-August 2012: Between May 2011 and August 2012, the Justice Ministers made a concerted effort to redesign the Tribunal Protocol, despite serious differences of opinion among their ranks. At the same time, President Mugabe was tactically lobbying other heads of state, pointing out what negative implications the Tribunal might have for them if allowed to continue.

During this time eleven of the fifteen Justice Ministers met with groups of legal experts lobbying against the Tribunal's suspension. The Justice Ministers agreed to a large extent with the lobby groups and included most of their recommendations in their own report to the Council and Summit. However, they acknowledged that the issue was no longer a legal one, but a political one.

2012: August 17/18: The redraft the Justice Ministers presented to the SADC Summit of Heads of State in Maputo, Mozambique, in August 2012 maintained the right of individual access, but with any jurisdiction in human rights put off until such time as a separate human rights Protocol would be adopted. However the Summit rejected the redraft of their own Justice Ministers.

The summit's final communiqué of 18 August 2012 explained that SADC leaders had *"resolved that a new Protocol on the Tribunal should be negotiated and its mandate confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States."* As a result, individuals would no longer be able to access the court, preventing them from seeking justice and undermining the rule of law.

2013: August 17/18: The Summit in Lilongwe, Malawi refined the terms of reference given to the Committee, instructing it to fast-track the negotiation of a new Protocol that would:

- Confine the Tribunal to the interpretation of the SADC Treaty and Protocols relating to disputes between member States, and
- Specify that the Protocol would only enter into force once ratified by two-thirds of member States.

2014: 17/18 August: The formation of the emasculated SADC Administrative Tribunal: During the SADC Heads of State Summit held in Zimbabwe at the Victoria Falls, a new Protocol was adopted for the Tribunal. The new Protocol changed the original jurisdiction of the Tribunal by taking away its

mandate to hear cases filed by individuals against States and only allowing it to hear cases brought by SADC member states against each other, also called inter-state disputes.

The adoption of the new Protocol in effect took away the possibility for individuals to approach the Tribunal to vindicate their rights. It should be noted that prior to its suspension, the SADC Tribunal adjudicated over and delivered several judgments against some SADC states and it granted remedies to their citizens. At the time of adopting the new Protocol, most of the affected citizens had not been compensated.

2015: 21 April: The Law Society of South Africa launched an application to declare the actions of South African President Jacob Zuma, as well as the country's Minister of Justice, Michael Masutha, and the Minister of International Relations and Co-operation, Ms Maite Nkoana-Mashabane, unconstitutional in relation to the suspension of the Tribunal 2011 and the adoption of the new Protocol in 2014.

2015: 24 July: Four dispossessed Zimbabwean commercial farmers and two Zimbabwean agricultural companies applied to join the case. They were represented by South African civil rights group AfriForum. The farmers had been denied the right to seek justice in their own country through policies and measures that deprived them of their property rights and failed to uphold their human rights – and those of their workers - during the illegal and violent farm invasions. All four had successfully participated in various court cases before the SADC Tribunal and, in all cases, the Tribunal had ruled against the Zimbabwe government.

The farmers and agricultural companies were: Luke Tembani, Ben Freeth, Richard Etheredge and Chris Jarrett as well as Tengwe Estates (Pvt) Ltd and France Farm (Pvt) Ltd. In several cases the Tribunal had ruled against the Zimbabwean Government and had found that the government had violated their human rights in many different ways through policies and measures which deprived the farmers of their property rights.

2018: February: The long-delayed hearing of the court case against South African President Jacob Zuma and his ANC government for their role in the closure of the SADC Tribunal in 2012, was set down for 5-7 February 2018 at the High Court in Pretoria.

2018: 5 February: Arguments were heard before three High Court Judges, including the Judge President. It was argued that President Zuma, by signing the Protocol which took away the rights of Southern African Development Community (SADC) citizens to go to the SADC Tribunal on human rights issues, was not acting consistently with his constitutional duties.

Advocate, Jeremy Gauntlett QC SC, acting for civil rights group AfriForm on behalf of four Zimbabwean farmers and two agricultural companies that had joined the case, gave the main argument. The three other advocates arguing against President Zuma were acting for the Law Society of South Africa and other human rights organisations. A additional advocate argued for President Zuma.

2018: 1 March: Judgment in case against President Zuma and the South African government: The High Court found that: *"South Africa remains bound by the [SADC] 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."* The judgment was welcomed by The Law Society of South Africa.

2018: 30 August: The South African Constitutional Court heard an appeal by the State in which it sought to overturn the High Court ruling that declared former President Jacob Zuma's participation in the suspension of the operations of the SADC Tribunal *"unlawful, irrational and unconstitutional"*.

2018: 11 December: The appeal against the High Court ruling: The South African Constitutional Court found in favour of the group of Zimbabwean farmers assisted by AfriForum, that former President Jacob Zuma was acting unlawfully and unconstitutionally when he, together with other leaders of the Southern African Development Community (SADC), took part in the suspension and dissolution of the SADC Tribunal's activities.

2019: 30-31 July: During Justice Femi Falana's keynote address at a meeting convened by the African Network on International Criminal Justice held in Dakar, Senegal, the Nigerian justice said that the Summit of Heads of State and Government should without further delay restore the SADC Tribunal's human rights mandate, and they should comply fully with the orders of regional tribunals and municipal courts.

2019: 10 August: Vimbai Nyemba, the Law Society of Zimbabwe's vice-president, implored President Emmerson Mnangagwa to engage his fellow African leaders at the forthcoming SADC Heads of State Summit [17/18 August] to consider resuscitating the tribunal. In response, President Mnangagwa said: *"Pertaining to the SADC Tribunal issue, let me state that no, we are not going to be reviving that one any time soon. We are all aware of the reason why it was closed down. It's a 'no' for now."*

2019: 16 August: The day before the SADC Heads of State Summit in Tanzania, Kenyan lawyer and African political commentator, Patrick Otieno Lumumba called for the revival of the SADC Tribunal. He said that the SADC Tribunal ought to be resuscitated and strengthened because it would give SADC Member-States an opportunity to deal with some problems that are unique to SADC, without compromising the question of sovereignty that most of the countries in the bloc take pride in.

2019: 21 August: The President of South Africa, Cyril Ramaphosa, officially withdrew his signature from the 2014 SADC Protocol which restricts the jurisdiction of the new SADC [Administrative] Tribunal to hearing inter-state cases. This removed the rights of individuals, both in South Africa and the entire SADC region, to access the Tribunal for legal redress.

Cases heard by the SADC Tribunal during its period of operation (2007-2010):

During the period that the SADC Tribunal was operational (2007-2010), it adjudicated in 18 disputes. Cases tended to fall within one of three categories: individuals versus SADC itself (employment disputes), incorporated companies versus national governments (commercial disputes), and individuals versus national governments (human rights cases).ⁱⁱ

It was the human rights cases, every one of them brought against the Zimbabwe government, that were of particular relevance for explaining the suspension of the court in 2011 and its unilateral closure by the SADC Heads of State in 2012.

Most notably, in the Gondo case, the SADC Tribunal awarded damages of nearly US\$17 million to nine Zimbabwean victims of organised violence and torture, in a landmark ruling that yet again exposed Harare's flagrant disregard of the rule of law.

The victims suffered bullet wounds, beatings and even paralysis as a result of the physical violence at the hands of the Zimbabwean police and soldiers.

ⁱ Merran Hulse, Silencing a supranational court: The Rise and Fall of the SADC Tribunal (25 October 2012): <http://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-Tribunal/>

ⁱⁱ Merran Hulse, Silencing a supranational court: The Rise and Fall of the SADC Tribunal (25 October 2012): <http://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/>