

## Southern Africa

The SADC Tribunal is a promising institution of international justice for the entire region. But without real political will, does the

# SADC Tribunal goes on

Tanya Pampalone

In November of 2008 Ben Freeth and a motley crew of white Zimbabwean farmers, who took their government to the Southern African Development Community Tribunal in Windhoek in an effort to win back their land, wept in open court when they heard the judgment passed down.

After months of stops and starts, the court unanimously found that the applicants who stood before them had been denied access to courts in their own country and that fair compensation was payable for the expropriated land. And, by a majority of four to one, the tribunal also ruled that the farmers had been discriminated against on the grounds of race. All of which added up to a clear violation of the SADC treaty.

One of the farmers, red-faced and cadaverous, said to a member of the legal team in disbelief: "I never thought, from black judges in Africa, we would get this kind of sympathy and understanding."

"It was quite a moment," says advocate Jeremy Gauntlett, who represented the 79 farmers in the application to the tribunal, which included Freeth and his 75-year-old father-in-law Mike Campbell, whose story is making the international documentary rounds as *Mugabe and the White African*, which has been shortlisted for an Academy Award.

"These are African judges who experienced colonialism and discrimination — the sharp end it. But they have the integrity to rise above it and to hold, uncompromisingly, that it's racial discrimination to take white farmers' lands and not put [land reform] on the basis of, for example, who is an absentee land owner or who is not farming it properly."

All this came down, of course, on the unlikely corner of Robert Mugabe Avenue and Bahnhof Street, just down the road from the British High Commission and opposite the police department, where SADC's most promising institution proudly sits, flags of the region adorning the stately building in the centre of Windhoek.

Since 2007, the SADC Tribunal has been receiving cases on disputes between natural and legal persons and their countries in the region, as well as overseeing the jurisdiction of the SADC institution and acting as its advisory body. In session three times a year, the tribunal boasts some of the region's top judges, including Justice Dr Luis Antonio Mondlane of Mozambique and Justice Ariranga Govindasamy Pillay, the former chief justice of Mauritius, who currently serves as the tribunal's president.

Despite its short lifespan, the tribunal has already made some substantive rulings against the region's rogue government. The court has handed down judgment, not only in the Campbell application, but has also ruled in favour of 71-year-old Luke Tembani, one of Zimbabwe's first indigenous farmers, whose land — which he has successfully farmed for the past 26 years — is under threat in what Gauntlett calls a Kafkaesque scenario where the land bank continually recalculated wildly



Beaten but not bowed: Zimbabwean farmer Ben Freeth with his father Zach at the SADC Tribunal in Windhoek. Photo: Brigitte Weidlich, AFP

## In need of divine intervention?

Growing up on a small Catholic mission in the north of Malawi, Charles Mkandawire wanted to be priest. But he ended up ditching his schooling at a Catholic seminary, changing direction and heading instead to the University of Malawi, where he received his law degree in 1986.

Right out of school, Mkandawire joined the Malawi judiciary as a resident magistrate, winding his way up through the legal ranks as registrar for his country's high court as well as its supreme court of appeal. He started up Malawi's labour court in 1998, becoming a high court judge in 2004.

It was in November 2006 that he was sworn in as registrar of the SADC tribunal, where his mandate was to set up what most in his profession agree is the region's most promising legal institution. Mkandawire now runs the administrative and financial aspects of the new body, registering cases and overseeing their research and



Tribunal Registrar Justice Charles Mkandawire

screening, to be sure that the applications comply with SADC law and protocol.

It's an awesome responsibility and one Mkandawire does not take

lightly, acutely aware of the tribunal's legal importance in the region as well as its key position in the success of SADC as an institution.

"You cannot have development, you cannot have proper regional integration if you do not entrench the rule of law, democracy and human rights," Mkandawire says.

"The tribunal is a catalyst for this integration. It's an important instrument in obtaining the objectives of SADC. Whether one likes it or not, in the process of integration, disputes are bound to arise and these disputes have to be interpreted by an impartial body. Later on these cases will involve member states themselves."

As his team in Windhoek prepares for a new year where it will ratchet up its capacity, Mkandawire's court just might need some divine intervention to muster up the political will to enforce its own judgments.

— Tanya Pampalone

fluctuating interest on his bond, then attempted to seize the land in realisation of the bizarre debt without even bothering to go to court.

And next year — very likely in April, when Zanu-PF will be celebrating 30 years since liberation — the tribunal is set to hear the case of the *Zimbabwe Human Rights NGO Forum vs Government of Zimbabwe*. The application has been brought on behalf of 12 Zimbabweans, who, their domestic court found, had been subject to violence and torture — including beatings with eve-

rything from batons to booted feet, as well as bullets that caused spinal injury and paraplegia and the death of a breadwinner, all courtesy of the Zimbabwe Republic Police and the Zimbabwe National Army. But though final judgments — and cost awards — were granted by Zimbabwe's court, the government won't honour the rulings. Their only outlet for justice now is the tribunal.

But foreign courts — or for that matter regional or international bodies — don't matter much to Robert Mugabe. Not long after the

Campbell judgment, the Zimbabwean head of state said at his birthday celebrations that the tribunal's rulings were "nonsense" and "of no consequence". "The few remaining

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white farmers should vacate their farms as they have no place here," Mugabe said. "Our land issues are not subject to the SADC tribunal."

And no one appears to be willing to force Mugabe's hand on the issue. According to the tribunal's registrar, Justice Charles Mkandawire, the decision on the Campbell case was submitted to SADC more than a year ago and, despite requesting that the recommendations on the case be expedited, the tribunal still awaits a decision from SADC on how to proceed.

"Any court would be concerned with noncompliance of its decisions," says Mkandawire.

"It's not just about Zimbabwe. International law enforcement depends on the political will of the member states — and that sits with the SADC summit. They have to monitor the enforcement mechanism. Even as the tribunal, our eyes are toward the summit. We have done our part and we cannot enforce our own decisions."

A SADC secretariat spokesperson would confirm only that it is still in the process of making arrangements to hear the matter.

So, despite the dramatic rulings against the government of Zimbabwe, like all international and regional courts, the tribunal cannot enforce its own judgment; there's no sheriff in town to pull up and hold anyone accountable.

Like President Jacob Zuma's Zimbabwe mediation team, the decision on what to do next — and the political will to back it all up — ultimately lies with SADC.

The Campbell decision appears to be yet another Zimbabwe question placed at the feet of the Southern African community; another weighty, complicated, messy

tribunal — or SADC itself — really matter?

# trial

matter begging to be addressed by a reluctant region.

## Courting justice

Though established in 1992 with the formation of SADC, the tribunal's members were only appointed at its summit in Gaborone in August 2005. By November 2006, Mkandawire was sworn in as registrar at a ceremony in Windhoek. His job: to set up and oversee the day-to-day administration of the court. It's been slow going with a lean staff and an even leaner budget. But, in the next few months, if all goes ahead as planned, there will be a total of 16 full-time employees at tribunal headquarters — excluding the 10 judges who rule on matters — who will ensure that the cases that are starting to trickle in from across Southern Africa see their day in court.

Ten justices have been appointed from the member states, with a minimum of three sitting judges required for rulings. Justices from Angola, Botswana, Malawi, Mauritius, Mozambique, Namibia, Swaziland, Tanzania, Zambia and even one Justice Antonia Guvava of Zimbabwe, form the current membership of the tribunal, five of whom sit as regular members. To ensure its independence, the SADC treaty outlines that members agree not to seek or receive instructions from any member states or from any authority external to SADC.

**F**inancial constraints and member judges who continue to work in their home countries and fly into Windhoek only to hear scheduled cases are just some of the challenges the tribunal faces. That it's an entirely new system is another. The fact is that most — even those in the legal profession and those working in human rights arenas in the region, where the tribunal is most needed — aren't aware that it exists.

Mkandawire says he's working to get the word out. The website, relationships with universities and outreach to human rights and legal groups in the region mark some progress in this endeavour.

Hurdles aside, Max du Plessis,

professor of international law at the University of KwaZulu-Natal, says the court is making huge strides.

"It has surprised commentators, academia and court watchers by virtue of the fact that in a short space of time it has opened its doors, accepted cases and has given important judgments in relation to SADC human rights issues, in particular in respect to Zimbabwe," Du Plessis says. "And it has done so in a way that has served the interests of justice in SADC. The force of its decisions can be seen from the response we have witnessed in the Zimbabwean government."

And the reality is that the majority of cases brought to the tribunal so far have been filed against the government of Zimbabwe — most of them brought by Gauntlett. ("I wouldn't want you to think I'm Florence Nightingale alone in an unlit ward in a hospital — there are a lot of other people involved in this," he says.) Gauntlett believes others in Zimbabwe aren't using the tribunal because, quite frankly: "The legal profession in Zimbabwe is hammered. People lack funding, they lack morale, they simply lack hope. And the idea of taking it further doesn't occur to them."

## In painful dignity

Zimbabwe's minister of justice and legal affairs, Patrick Chinamasa, rubbished the entire tribunal outright in June.

"The tribunal has no jurisdiction over Zimbabwe," Chinamasa told the *Zimbabwe Times*. "We are not ... party to the (SADC tribunal) protocol and it has no jurisdiction over Zimbabwe. The judges are not SADC."

In September the Zimbabwean government and Chinamasa were criticised by the African Bar Associations and Rule-of-law Institutions, which include the Southern African Development Community Lawyers' Association and the African Regional Forum of the International Bar, when they met in Arusha, Tanzania. In a communiqué they "observed with alarm the current efforts of the government of



**Law and order:**  
**Advocate Jeremy Gauntlett has brought key human rights cases to the SADC Tribunal.**

Photo: David Harrison

Zimbabwe ... to cause SADC to dismantle a sub-regional judicial organ — the SADC tribunal."

But Du Plessis says that Zimbabwe's efforts to disregard the tribunal's decision says more about its weight in the region than anything else. "That Zimbabwe is purporting to ignore the tribunal's decision speaks volumes. Of course, had the decision gone in its favour, Zimbabwe would be celebrating the tribunal's judgment."

**C**urrently, the Zimbabwean High Court is sitting with an application that was brought at the end of November on behalf of the 79 farmers involved in the Campbell case, which seeks to register the tribunal ruling there, in an attempt to force the government to recognise the judgment. The case was adjourned in "due course" and a ruling on it isn't expected for months.

But Zimbabwean policy analyst Deprose Muchena says the massive indecision from the region and its resolve to keep its distance from Zimbabwe has put SADC in serious danger of losing its credibility as a regional body.

"If you close all options to regional descent, you are forcing people to seek other avenues," Muchena says, pointing to alternatives for law and justice that lie outside Southern Africa, such as the African Union, which would effectively make the institution itself inconsequential in matters of its own community.

"The SADC leaders are busy fiddling with their fingers in painful dignity," he says, as Zimbabwe

erodes on all fronts.

SADC's delay is not stopping Gauntlett. On the back of the tribunal award, he plans to register the ruling not just in Harare, but in Pretoria as well. If Zimbabwe doesn't pass the judgment into its own domestic law and enforce it there — which isn't likely to happen as it would reverse the contentious land reform issue — the country's assets in South Africa can be attached to secure the costs awarded by the tribunal. Things like, say, the Zimbabwean government's aircraft and non-diplomatic buildings in South Africa. "We do this sort of thing all the time when enforcing foreign awards and judgments," he says.

But even if Gauntlett manages to garner some costs for his clients, it probably won't be courtesy of the government of Zimbabwe via the SADC tribunal.

"You can have the most wonderful highfalutin court in the world but if the government controls the police and the army — well, just think about that in terms of a country," says Gauntlett. "You have a situation where the government is controlling all the other levers of the state and the courts are left helpless and hopeless. And the trouble with the system in Zimbabwe itself is that ultimately when you corrupt your judiciary, then what you are left with is just wood panelling and horse-hair wigs."

It seems only SADC has the power to save its tribunal — and perhaps even itself — before it becomes yet another corpse in Mugabe's carnage.

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