



03 September 2009

HON. CHINAMASA'S ATTEMPT TO 'PULL OUT' OF SADC TRIBUNAL FUTILE AND UNJUSTIFIABLE

Zimbabwe Lawyers for Human Rights (ZLHR) has been observing with great alarm the repeated contemptuous attacks on the Southern African Development Community (SADC) Tribunal by various state representatives since 2008. These have culminated in an article penned by one Mabasa Sasa, reported in *The Herald* of 2 September 2009 and entitled '*Zim pulls out of SADC Tribunal*'.

The article follows ZLHR's disclosure in *The Legal Monitor* of Monday 31 August 2009 of the falsity of Minister of Justice & Legal Affairs, Patrick Chinamasa's contention that the Republic of Zimbabwe is outside the jurisdiction of the Tribunal and/or that the Tribunal is 'illegal'. Honourable Chinamasa – using the state-controlled and unreformed public media - has repeatedly provided legally and factually incorrect information to the Zimbabwean public and observers further afield as to the legality of the Tribunal *vis-à-vis* Zimbabwe and, by implication, other SADC Member States.

If the Honourable Minister is being advised by government lawyers from the office of the Attorney General, as is the proper course of business, these individuals are negligently or intentionally misleading the Honourable Minister to make false statement to the general public, and it is clear that he needs new, properly informed, advisors. It would be of even greater concern if such misleading submissions were to be repeated by any member of the Zimbabwean delegation who will attend the upcoming SADC Summit.

According to Minister Chinamasa, the SADC Protocol on the Tribunal ("the Tribunal Protocol") has been ratified by less than two-thirds of the total membership of SADC and, as such, the Tribunal is not validly constituted. He goes on to argue that, consequently, the SADC Tribunal cannot exercise jurisdiction over Zimbabwe or any other SADC Member State.

It would appear that the Minister, through his errant advisors, is relying on Articles 35 and 38 of the Tribunal Protocol, which read as follows:

'ARTICLE 35 RATIFICATION

This Protocol shall be ratified by Signatory States in accordance with their constitutional procedures.'

'ARTICLE 38 ENTRY INTO FORCE

This 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.'

What Honourable Chinamasa fails and/or neglects to mention or address is the fact that, in 2001, the SADC Treaty was amended so as to make the SADC Tribunal an integral part of both the Treaty and the Institution of SADC. The said amendment to the SADC Treaty specifically established the SADC Tribunal and incorporated it into SADC as an integral organ. The amendment went on to refer to the Tribunal Protocol and **categorically excluded it from the usual requirement for ratification by two-thirds before it could come into force and effect.**

The relevant section of the Amendment to the SADC Treaty reads as follows:

**'ARTICLE 16
THE TRIBUNAL**

1. *The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.*
2. **The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit.** [Own emphasis added.]
3. *Members of the Tribunal shall be appointed for a specified period.*
4. *The Tribunal shall give advisory opinions on such matters as the Summit or the Council may refer to it.*
5. *The decisions of the Tribunal shall be final and binding.'*

Article 22 referred to in Article 16 above provides as follows:

**'ARTICLE 22
PROTOCOLS**

1. *Member States shall conclude such Protocols as may be necessary in each area of co-operation, which shall spell out the objectives and scope of, and institutional mechanisms for, co-operation and integration.*
2. *Each Protocol shall be approved by the Summit on the recommendation of the Council.*
3. *Each Protocol shall be open to signature and ratification.*
4. ***Each Protocol shall enter into force thirty (30) days after the deposit of the instruments of ratification by two thirds of the Member States.*** [Own emphasis added.]
5. *Once a Protocol has entered into force, a Member State may only become a party thereto by accession.*

6. *Each Protocol shall remain open for accession by any State subject to Article 8 of this Treaty.*
7. *The original texts of each Protocol and all instruments of ratification and accession shall be deposited with the Executive Secretary who shall transmit certified copies thereof to all Member States.*
8. *The Executive Secretary shall register each Protocol with the Secretariat of the United Nations Organization and the Commission of the African Union.*
9. *Each Protocol shall be binding only on the Member States that are party to the Protocol in question.*
10. *Decisions concerning any Protocol that has entered into force shall be taken by the parties to the protocol in question.*
11. *No reservation shall be made to any Protocol.'*

As a result of this amendment to the SADC Treaty, Articles 35 and 38 of the Tribunal Protocol, which had required the two-thirds ratification, were **repealed** and the requirement therefore fell away. The Agreement Amending the Protocol clearly provides for this, as follows:

‘ARTICLE 16

REPEAL OF ARTICLE 35 OF THE PROTOCOL

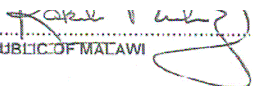
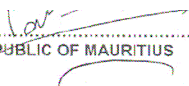
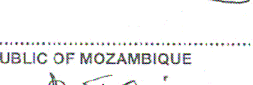
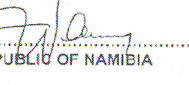
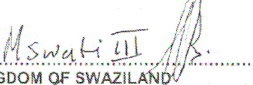
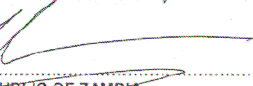
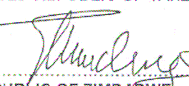
Article 35 of the Protocol is repealed.'

‘ARTICLE 19

REPEAL OF ARTICLE 38 OF THE PROTOCOL

Article 38 of the Protocol is repealed.'

Honourable Chinamasa and/or his legal advisors neglected or failed to appreciate that these requirements for ratification were thus made redundant by the SADC Agreement on the Amendment to the Protocol at their meeting in Luanda, Angola, on 3 October 2002. SADC Member States’ Heads of State and Government and/or their duly authorized representatives agreed that it was not necessary to ratify the Protocol and appended their signatures to this Agreement. In fact, the Minister’s colleague and counterpart, Stanislus Mudenge, agreed and signed this Amendment on behalf of Zimbabwe, as follows!

 REPUBLIC OF MALAWI	 REPUBLIC OF MAURITIUS
 REPUBLIC OF MOZAMBIQUE	 REPUBLIC OF NAMIBIA
 REPUBLIC OF SEYCHELLES	 REPUBLIC OF SOUTH AFRICA
 KINGDOM OF SWAZILAND	 UNITED REPUBLIC OF TANZANIA
 REPUBLIC OF ZAMBIA	 REPUBLIC OF ZIMBABWE

Agreement Amending the Protocol on Tribunal

Contrary to Honourable Chinamasa's contentions, therefore, the Tribunal is a creation of the Declaration and Treaty of SADC, and **does not** owe its existence to the ratification of the Tribunal Protocol. It is clear from the above provisions of the SADC Treaty that, while all other Protocols require ratification by two-thirds of SADC Member States, the same rule **does not** apply to the Protocol relating to the Tribunal. This was knowingly agreed to by SADC Member States and, in fact, they found this Tribunal to be so critical to the protection of the objectives and workings of SADC that they knowingly, intentionally and willingly did away with the need for ratification by two-thirds of the SADC Member States.

It is being economic with the truth for the government Minister to state that Zimbabwe did not ratify the Protocol and fail to also disclose that having not so ratified the Protocol it did however find it fitting to amend it.

If Honourable Chinamasa, despite this, would have the public believe that there is a need for SADC Member States to ratify the Protocol establishing the Tribunal, he is alone in this regard. No other SADC Member State has read the Treaty and/or the Tribunal Protocol in the same manner.

Further, if the Minister truly believes that this is the legal position and that the SADC Tribunal is not legally in existence, we challenge him to advise the public as to why the Government of Zimbabwe found it necessary and in their interests to nominate and second a Judge of the High Court of Zimbabwe – Justice Antonia Guvava - to sit as a Member (Judge) of the SADC Tribunal, and why she has not been recalled.



Swearing in of a member, left, H.E. Justice Antonia Guvava (Zimbabwe): www.sadc-tribunal.org/page.php?p=gallery (last accessed 3 September 2009)

In his article Mabasa Sasa alleges that the Government of Zimbabwe ‘... and nine other SADC members are yet to ratify both the Protocol creating the Tribunal and a subsequent amendment to that document’. The facts on the ground speak otherwise.

What is most alarming is that, as the SADC Tribunal is now an integral part of the SADC Treaty, any attempt to “pull out” of the Tribunal would amount to pulling out of SADC as a whole. It has serious economic and other implications. In turn, this would put the integrity of Zimbabwe within the SADC region, and the SADC-brokered Interparty Political Agreement, in jeopardy. Clearly this cannot be the intention of the inclusive government. In any event, Honourable Chinamasa cannot unilaterally have the privilege of opting out of voluntarily assumed commitments that he or his colleagues no longer like unless he is properly authorized by his superiors, who are the President and the Prime Minister.

ZLHR is reliably informed that such utterances and others attributed to the Attorney General and his underlings have fuelled mayhem and pandemonium as violations continue to occur on farms with the perpetrators claiming that the SADC Tribunal has no jurisdiction over Zimbabwe.

The utterances of government officials in Zimbabwe have the potential to cause extreme harm to the integrity of this integral organ of SADC, and endanger the protection of the rights of Member States and their subjects as enshrined in the SADC Treaty and an extensive range of Protocols. ZLHR calls on the leaders of the Inclusive Transitional Government to reflect and take action on this potentially far-reaching decision.