IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM.

MISCELLANEOUS CIVIL CAUSE NO. 23 OF 2014.

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA (1977 CAP.2 R.E 2002);

AND

IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT (CAP.3 RE 2002);

AND

IN THE MATTER OF A PETITION TO CHALLENGE THE SUSPENSION OF THE SADC TRIBUNAL 2012;

AND

IN THE MATTER OF A PETITION TO CHALLENGE THE UNCONSTITUTIONAL ACT OF THE GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA TO VOTE IN FAVOUR OF SUSPENSION OF THE SADC TRIBUNAL

Between;

TANGANYIKA LAW SOCIETY .....PETITIONER

Versus

MINISTRY OF FOREIGN AFFAIRS AND INTERNATIONAL COOPERATION OF THE UNITED REPUBLIC OF TANZANIA.....1ST RESPONDENT;

AND

THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA.....2ND RESPONDENT

(CORAM; LILA, PJ; MUJULIZI, AND BONGOLE, JJ.)

JUDGMENT

A.K. MUJULIZI, J.

Introduction:

The respondents are brought before the Court in their representative capacity –responsible for the execution of the impugned acts –legality of the Suspension; and Constitutionality of the act of voting in Summit to support resolution to effect suspension of the operations of the SADC Tribunal; for and on behalf of the Government of the United Republic of Tanzania. The impugned acts or omissions, relate to the State –International Treaty practice; its obligations and liability under such treaty; and accountability under the national Constitution in case of inconsistency; in this event as a member of the Southern African Development Community ("SADC").

SADC is a Community of 15 Member States in Southern Africa, including Tanzania. It was established to enhance regional development through concerted and co-ordinated efforts of the State parties to the Treaty; guided by its principles among others; ***respect, protection and***

promotion of human rights, democracy and the rule of law –SADC Treaty (1993) 32 KM 116, Preamble and Article (4).

To this end, among the foundational institutions of SADC, is the Tribunal –***Articles9 (g) and 16–SADCTreaty***; which, was at all times material to the matter in dispute, "***constituted to ensure adherence to and the proper interpretation of the provisions of [the] Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it***" –**Article 16 (1)**. In other words –the legal advisory; compliance/enforcement; and judicial–dispute resolution organ of the Community, with jurisdiction to entertain, among others, human rights related complaints by individual and legal persons, against any State party, subject only to prior exhaustion of similar remedies available in their respective municipal courts. ***Article 15 Tribunal Protocol.***

Following constitutional reforms in the Republic of Zimbabwe, one of the States party to the SADC Treaty, certain persons adversely affected by the subsequent actions of that State –effectively denying aggrieved parties remedy in its domestic courts; successfully filed legal action in the SADC Tribunal, which granted them redress –judgment and orders. Although Zimbabwe had at all material times submitted to the jurisdiction of the Tribunal in defence of its position, it subsequently refused to recognise or honour the decisions handed out by the Tribunal –resisting enforcement/execution at various levels. The detailed background of this challenging incident in the formative history of the Community, is eloquently summarised in one of the decisions of the Constitutional Court of South Africa on the matter, -***Government of the Republic of Zimbabwe v. Fick and Others (CCT 101/12) (2013) ZACC 22.*** Other cases on the matter include a decision of d the Supreme Court of Zimbabwe in ***Re Ex parte Commercial Farmers Unions, Judgement No. SC*** **31/10 (Supreme Court of Zimbabwe, 26 Nov. 2010**

unreported); and **Etheredge (2009)** ***ZWHHC1***) to mention but a few. We do not find it necessary to recapitulate the story in this judgment.

In 2009 Zimbabwe challenged the legality of the SADC Tribunal before the SADC Council of Ministers –Justice and Attorney Generals; leading to a resolution by the SADC Summit in August 2010 – suspending operations of the Tribunal; prohibiting the Tribunal from admitting new cases, pending a review of its functions and terms of reference. To this end M\s ***World Trade Institute Advisors (WTI),*** were contracted by SADC to undertake the review. However, apparently without considering the report, the Summit subsequently summarily terminated services of the Judges of the Tribunal; followed by a resolution –limiting the Tribunal's mandate, to interpretation of the SADC Treaty and Protocols relating to disputes between Member States; and finally, effectively suspending further hearing of any matter pending before the Tribunal.

The Petitioner, the National Bar Association of Tanzania Mainland, a legal entity established under the **Tanganyika Law Society Act (Cap.307, RE 2002**) on behalf of its aggrieved members, seeks from this Court ,orders holding the Respondents accountable under the Constitution, the SADC Treaty, and other International law Human Rights norms, on allegations that the impugned actions were in breach of the Treaty; and also either violated, violet and are likely to constitute violation of their inalienable –fundamental right to unimpeded access to justice and therefore inimical to the principles of rule of law –one of the foundational principles of the Community –**Article 4 (c)** of the Treaty.

The Petition:

The jurisdiction of the Court is invoked pursuant to ***Articles, 30(3) and 26(2), of the Constitution of the United Republic of Tanzania,***

1977 (Cap. 2 RE 2002) as amended (" the Constitution"), and **sections** 4 and 5 ***of the Basic Rights and Duties Enforcement Act (Cap. 3 RE 2002***.("the Act").

The facts alleged by the petitioners were not disputed; briefly stated as follows;

(a) SADC is a 15 member intercontinental organisation established by a treaty in 1992 constituting one of the regional pillars of the African Economic Community (AGC) and formally recognised as a Regional Economic Community (REC) of the African Union (AU).

(b) The Summit of Heads of State of Government is the supreme policy making organ - Articles 9(2)(a) and 10 of the Treaty.

(c) The SADC Council of Ministers –Article 9(b), has the mandate to oversee the functioning and development of the SADC and to ensure proper implementation of SADC policies - Article 10.

(d) The SADC Tribunal composed of 10 Judges –five regular and five alternate members and constituted by a quorum of three judges, is the Judicial Organ of the Community.

(e) The Tribunal is an International Court applying SADC regional laws, relevant international instruments ratified by member States and applicable municipal laws.

(f) The Tribunal was prior to the impugned actions providing a vital alternative forum for SADC citizens and juristic persons in lieu of municipal remedies, adequate resolution of their disputes relating to violation of their rights, or breach of the SADC laws.

(g) The respondents were at all times material to the impugned actions, the key legal and policy advisors to the Government.

(h) The impugned actions were at the instance of one of the State parties, challenging the legality of the Tribunal leading to a resolution by Summit declining to reappoint or replace the Judges –members of the tribunal upon expiry of their respective terms, effectively ensuring that the Tribunal does not realise quorum to conduct business, and prohibiting it from admitting new cases, pending review of its role, functions and terms of reference.

(i) In May 2010, Summit decided not to reappoint or replace Tribunal Judges whose terms had expired - no reasons for non-appointment or replacement were given. The immediate past President of the Tribunal, Justice Arivanga Pillay, who had been elected in November 2008, was terminated despite the fact that the term of the office was five years. Further, no reasons were given for the termination, nor was he accorded hearing.

(j) In August 2012, the Summit resolved that "a new Protocol in the Tribunal should be negotiated and that its mandate should be limited to interpretation of the SADC Treaty and Protocols relating to disputes between Member States." By the same decision, the suspension of the operations of the SADC Tribunal effective since August 2010 was extended.

(k) The respondents were at all material times continuing with implementation of the resolutions of the Summit.

PRELIMINARY LEGAL ISSUES AND PROCEDURES:

When the petition was called to hearing, we heard, and overruled a preliminary objection raised by the Hon. Attorney General on points of law on 15 December 2014; and, with the consent of both parties ordered hearing of the matter to proceed by way of written submissions, -per sequence given by the court. We are grateful to counsel for their

compliance and well-reasoned arguments. However, unknown to Court but to the knowledge of the Respondents, decisions concerning the very subject matter before the Court had taken place with the full participation of the Respondents, oblivious to these proceedings.

The Summit had since 18 August 2014,already adopted a new Protocol with the full support of the Government (read Respondents) who did not deem it necessary to apprise the Court of these developments. This fact was only brought to the attention of the Court, by the Petitioners' counsel in their written submissions filed on 20 March 2015. The respondents' reaction to these developments, in relation to the matter before Court, was only through a reply to the submissions on 10 April 2015.

In our considered view, both counsels' conduct on this matter was reprehensible; more so, on the part of the office of the Attorney General the active participant in both processes. The developments were fundamental to the constitutive cause of action; they ought to have moved the Court for necessary orders; to amend pleadings; and, variation or departure from the earlier orders. The facts were so fundamental; not the type to be merely communicated from the bar in written submissions as a by-the-way. Effective means are plenty under the rules of procedure, by which the Court could be brought up to speed as to such developments in order to make appropriate adjustments; in this event apart from the danger of violating the "*res subjudice*" rule, the issues, **whether**; (a) ***-the matter had been overtaken by events,*** and or, (b) ***-whether there were any residual issues and remedies remaining to be given by the Court.***

Be what it may, it is our duty to dispose of the issues as raised in the written submissions. We believe, the matter can adequately be resolved under the following heads;

(a)–**Whether the adoption of the new Tribunal Protocol by Summit rendered these proceedings nugatory.**

(b) –**Whether the High Court of Tanzania has the jurisdiction to overturn, change or proclaim the decisions of the SADC Summit ineffective.**

(c) –**Whether the Petitioner's, "new" or "additional" orders as prayed for in the written submissions are tenable.**

We propose to start with the second issue,- (b) – **the jurisdiction of the High Court in relation to decisions of the SADC Summit**. In our considered view, the issue is too general to afford adequate consideration. It seems to invite us to interpret the Treaty generally. The case before the Court does not invite us to make any orders by way of declaration or otherwise against any decision of the Summit ***per se***, as implied by the Respondents' counsel. Even then, once it is admitted that SADC is an international legal person independent of its Members, then it goes without saying that the decisions of its institutions –including the Summit, are to the rest of the world, SADC decisions *qua* SADC; as such, liable to judicial supervision before courts or tribunals of competent jurisdiction; in this event the Tribunal –**Article 32** –Treaty. SADC is not dressed with the Sovereignty of its Member States but by **Article 31**, has specified diplomatic immunities. It has legal residence and operational power within the respective States.

By **Article 6 – (5)** of the Treaty, "Member ***States shall take all necessary steps to accord this Treaty the force of national law***." The Treaty therefore creates norms capable of enforcement in the domestic courts of competent jurisdiction, unless it is disputed that the SADC Treaty has force of law in Tanzania or a particular aspect of the dispute

is within the exclusive jurisdiction of an international tribunal of competent jurisdiction; which is not the case in this event.

Article 42 of the Treaty states that it "***shall***" come into force thirty (30) days after the deposit of the instrument of ratification by two-thirds of the States listed in the Preamble. **Article 24(1) of the Vienna Convention on International Treaties** provides that "[a] ***treaty enters into force in such a manner and upon such a date as it may provide or as the negotiating States may agree***". We have no doubt therefore that Courts of competent jurisdiction in Tanzania can entertain an action in a proper case, challenging a decision of SADC subject only to express limitations within the treaty; for instance –exclusivity of the SADC Tribunal in certain matters as aforesaid. In this event it is not a clear cut issue; **the question relates to suspension of the very Tribunal to which recourse would have been had by the aggrieved parties.** It therefore raises the issue –**whether in the absence of an operational Tribunal; consequent to admitted actions of the State parties, a State party can be held liable for the acts of SADC in its domestic courts?**

In the absence of a functional Tribunal, and in light of the African Commission's opinion in the ***Tembani Case*** supra, – that it has no jurisdiction on SADC ***per se*** under the Charter, it is only through the doors of this court that the petitioner or any other aggrieved party (other than State parties) can find recourse in relation to disputes arising out or concerning the Treaty. It cannot be contended –seriously, that in the absence of the Tribunal, individual and juridical parties not being parties to the Treaty have no recourse to domestic courts; or that such courts cannot inquire into the issue whether State parties through either the Ministerial Council or by Summit, have legitimately, assumed the functions of the Tribunal under the Treaty. **Articles 9.-(g)** and **16** of the

Treaty entrench the principles of separation of powers; and, checks and balances –the functions of the Tribunal are to ensure adherence to; and the proper interpretation of the Treaty. Its decisions are final –binding on the parties.

In ***Francovich*** **[1991] ECR 1-5357**, the European Court of Justice held that Member States are liable in domestic courts for violations of EU law, including failure to comply with European Court of Justice Judgments. The cause of action being –analogous to breach of statutory duty – it is "*inherent in the system of the Treaty.*" We find this authority to be of persuasive value in this context. In **Government of the Republic of Zimbabwe V Fick and Others [2013] ZACC 22**, the Supreme Court of South Africa held that **Article 32** of the Tribunal Protocol imposes a legal obligation on South Africa to take all legal steps necessary to facilitate execution of the Tribunal decrees/orders.

We are persuaded in this context, that in the absence of any other efficacious forum to adjudicate the matter, the High Court of Tanzania has inherent powers to entertain the matter. Admittedly, the Petition as drafted, may somewhat have overstated and/ or oversimplified the matters in contention; however, the subject matter in the context of the undisputed facts, relates to whether - **having acceded to the right – access to justice, through the avenue of an international Treaty providing for a Tribunal, the Government can legitimately –under the Constitution, the Treaty and other international legal norms; acting in agreement with other States suspend, or rather, terminate such access.**

In the context of Constitutionality, pursuant to **section 4** of **the Act [Cap. 3 RE 2002]** the jurisdiction of the court is founded on a petitioner's claim that either any of his fundamental human rights, enumerated in articles 12 to 29 of the Constitution, "*...**has been**, **is***

being, or is likely to be violated by any person..." –**Article 30.-(30)** of the Constitution –**Registered Trustees of Chama Cha Demokrasia na Maendeleo & Others v the Chairman National Electoral Commission of Tanzania & Another, Misc. Civil cause No. 72 of 2007** at Page **9**, (unreported –cited to us earlier during hearing of the preliminary objection).The duty of Court is to establish –upon due inquiry, *whether on a balance of probabilities such claim - has been established on the facts presented.*

In this event, as stated earlier, the respondents admitted the impugned acts. Access to the Tribunal, as an alternative avenue of justice to residents of the SADC region, had been suspended; and later on completely abrogated. The issue for determination therefore remains relevant as it seeks to answer the question in our view –***whether the impugned acts thus admitted by the respondents contravene Articles 13(1), (3) and (6)(a) of the Constitution and/or Articles 3, and 7 of the African Charter on People's and Human Rights, the Treaty, or any other International Human Rights norms.*** Put in simple terms, the issue before Court is –***whether in the exercise of its executive powers as a Sovereign in the course of entering into; and complying with; international treaties and obligations, the government has powers to derogate from the Constitution***. It is a present-continuous issue; therefore distinguishable from the cases cited to us by the learned Principal State Attorney.

The discussion above also takes care of the issue on ***whether the matter has since been overtaken by events?***. It was conceded that indeed some of the prayers had lapsed.

Remedies Sought;

We propose to reserve our determination on the issue of new or additional prayers, to later on when considering the general issue of reliefs. Suffice for now to mention that, out of the 8 reliefs previously prayed for by the petitioner, only four remain relevant;

> *"1. Declaratory order that the 1st and 2nd respondents knowingly contributed to or did not take adequate measures to prevent the suspension of the SADC tribunal by the SADC Summit of Heads of State to government in violation of article 13(1), 13(3) and 13(6)(a) and knowingly contributed to the decisions and actions of the Government of Tanzania and* [sic - not clear]*provisions of the African Charter, Protocol on the relations between the AU and RECS, the SADC treaty, the SADC Tribunal Protocol and general principles of the rule of law...*
>
> *4. Declaratory order that the 1st and 2nd respondents knowingly contributed to or did not take adequate measures to prevent the review of the protocol on the Tribunal - resolved by the SADC summit of Heads of state or government in exclusion of the private sector and civil society in violation of article 13(1), 13(3) and 13(6)(a), and knowingly contributed to the decisions and actions of the government of Tanzania which breached article 23 of the SADC Treaty;*
>
> *6. An order that the 1st and 2nd respondents should undertake the necessary measures to correct the constitutional and international law violations;...*
>
> *8. Such other and further reliefs as the honourable court deems fit."*

The Submissions;

The Petitioner's case

The Constitution was promulgated in Swahili - the National language. The Court is invited, based on ***Attorney General and Another v Nassoro Athumani Gogo and Another, Consolidated Civil Appeals Nos. 105 and 81 of 2006 (unreported) at page 8***; -relying on, and upholding DPP ***v. Daudi Pete (1993) TLR 22 at page 33***; to construe the Constitution based on the Swahili version; in particular, with respect to **Article 13, - (1), (3) and (6) (a)** which provides:

> ***"(1) Watu wote ni sawa mbele ya sheria, na wanayo haki bila ya ubaguzi wowote, kulindwa na kupata haki sawa mbele ya sheria.***
>
> ***(3) Haki za raia, wajibu na maslahi ya kila mtu na jumuiya ya watu yatalindwa na kuamuliwa na Mahakama na vyombo vinginevyo vya mamlaka ya Nchi vilivyoweka na sheria au kwa mujibu wa sheria.***
>
> ***(6) Kwa madhumuni ya kuhakikisha usawa mbele ya sheria, mamlaka ya Nchi itaweka taratibu zinazofaa au zinazozingatia misingi kwamba***
>
> ***(a) Wakati haki na wajibu wa mtu yeyote inapohitajika kufanyiwa maamuzi na Mahakama au chombo kingine chochote kinachohusika basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu na pia haki ya kukata rufaaau kupata nafuu nyingine ya kisheria kutokana na maamuzi ya mahakama au chombo hicho kinginecho kinachohusika."***

The Court is invited to understand the legislature to have intended the following meaning;

"(1). All persons are equal before the law and are entitled without any discrimination to protection and equal rights before the law.

(3). The rights of citizens, duties and interests of every person and community of persons shall be protected and determined by the court and other agencies of state established by or under the law.

(6). For the purpose of ensuring equality before the law, the state authority shall put in place appropriate mechanisms which take into account the following principles, namely:

(a) When the rights and duties of any person are being determined by the court or any other agency concerned, the person shall be entitled (sic) *an opportunity of fair hearing and the right of appeal or other legal remedies against the decision of the court or any* other body."

Counsel did not explain the problems or limitations -inconsistency in the official English version of the Constitution –the basis for inviting the court to construe the Articles in question in accordance with the clear meaning of the Swahili version. However, it was submitted that, the expression "***sheria***" in **Article 13,-(3)** and **(6) (a)** of the Constitution encompasses Municipal and International laws; as well as Regional treaties. Further, that while it is the prerogative of the executive to enter into international treaties; and other relations or arrangements; for cooperation binding on the country and its people; the State ***"does so with all knowledge of the contents thereof and in full knowledge of its own laws and legal policy***" -**Ikunda and Another v. Republic (1970) EA 453 (456)**. In other words, in signing the SADC Treaty; and Parliament ratifying that treaty; the State was, in relation to the SADC Tribunal Protocol not, exercising a discretionary grant of right to access to justice, but fulfilling;(a) Constitutional duty; and (b) international

treaty obligations; to ensure that the rights of the people, thereby affected under the Treaty obligations would be protected by due process in accordance with the guarantees enshrined in **Article 13(3)** and **(6)(a)** as observed by this Court in the ruling on the preliminary objection on 15 December 2014.

The importance of the fundamental right to access to justice was emphasised by the Court of Appeal of Tanzania in **Julius Ishengoma Francis Ndyanabo v. Attorney General (2004) TLR 14** at page **33** in the following terms;

> ***"The Constitution rests on three fundamental pillars namely, (1) rule of law (2) fundamental rights (3) independent, impartial and accessible judicature. These three pillars of the Constitutional order are linked together by the fundamental right of access to justice. As submitted by Professor Shivji, it is access to justice which gives life to the three pillars. Without that right, the pillars would become meaningless, and injustice and oppression would become the order of the day."***

Further ***(at p.34)***

> ***"Access to courts is undoubtedly a cardinal safeguard against violations of one's rights whether those rights are fundamental or not. Without that right, there can be no rule of law, and therefore, no democracy. A court of law is the "last resort of the oppressed and bewildered." Anyone seeking a legal remedy should be able to knock on this door of justice and be heard."***

It is argued further that, the stance taken by Tanzania in relation to its treaty obligations and practice under **Article 15 of the SADC Tribunal Protocol;** is contrary to its corresponding position in other

regional and international courts/tribunal –the East African Court of Justice (EACJ), and in the African Court on Human and People's Rights (ACHPR). In the two courts, (both based within its territory at Arusha), Tanzania accepted the right of natural and legal persons to have unimpeded access to the international courts, in actions against State parties.It is argued that; the respondents did not in this case offer any reason or rationale for reversal/removal of the similar right in the context of the impugned decisions. Reversal of such a fundamental right, - "***required strong and convincing reasons; justifiable under the Constitution and law of the country. The decision to reverse the right requires the involvement of the beneficiaries (natural and legal persons)***"; to have a say in the matter, pursuant to **Article 23 of the SADC Treaty**. In any event, if there was good cause to redress any mischief in relation to the operations of the Tribunal –which is doubted; then as held in the *Ndyanabo* Case, supra, at page **42** - "***the right way to deal with that evil is not to close the doors of justice.***"

Access to international and regional courts is facilitated by administrative acts or arrangements; in accordance with their establishing Constitutions and procedural protocols; access to national courts is by legislation. In all instances, the constitutive Government actions are subject to compliance with the Constitution and relevant instruments which protect against denial of Human rights. We were referred to **Reid v Covert, 354 US 1 (1957);** in which the United States Supreme Court held;

> " ***The concept that the Bill of Rights and other Constitutional protections against arbitrary governments are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine, ad if allowed to flourish, would destroy the benefit of a written Constitution and undermine the***

basis of our government. If our foreign commitments become of such a nature that our government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which is prescribed. But we have no authority or inclination to read exceptions into it which are not there."

To that extent, the legitimacy of the impugned acts, have to be considered within the Constitutional framework –Government was bound to do so subject to taking due consideration of the preservation of the fundamental right –access to justice. Government is required by the Constitution to ensure that human rights are preserved and protected; it must also adhere to the principles of democracy. Pursuant to **Article 8(1)(a),**Government derives its powers and authority from the people through the Constitution. By **Article 9(a)**, State authorities are required to direct their policies and programs toward ensuring that human dignity and other human rights are respected and cherished. It is therefore urged that the impugned actions; do not derive legitimacy from the Constitution; to the contrary, contravene **Articles 8(1)(a)** and **9(a);** and violate **Article 13(6)(a)** of the Constitution. Tanzania, as a State party to various international human rights instruments, is bound thereby; and, pursuant to the Constitution; to observe the Universal Declaration of Human Rights 1948.

In **Christopher Mtikila v Attorney General (2006) TLR 279** at page **30**, this Court stated:

"...we have no doubt that international conventions must be taken into account in interpreting, not only our Constitution but also other laws, because Tanzania does not exist in isolation, it is part of a comity of nations. In fact, the whole of the Bill of Rights

was promulgated in the Universal Declaration of Human Rights".

In **DPP v Daudi Pete** supra at page **34** the Court of Appeal held that;

> "*In interpreting the Bill of Rights, articles 12-29 of the Constitution, account must be taken of that Charter and that the bill of rights and duties embodied in the Constitution, is consistent with the concepts underlying the African Charter of Human and Peoples' Rights as stated in the preamble of the Charter*".

We were also referred to **Legal and Human Rights Centre and Two Others v Attorney General (2006) TLR 240** at page 271. The Executive, like the Judiciary, are obliged or bound to do what the Constitution and the law of the country provide –**The Attorney General v Lesimoi Ndeinaiand Another (1980) TLR 214 (CAT).**

The impugned actions of the Government, it is argued, also contravened the provisions of **Articles 3** and **7** of the **African Charter of Human and Peoples Rights** which guarantees equal justice; and access to justice, and as such, contravened **Articles 15** and **18** of the **SADC Tribunal Protocol.**

It is submitted further that the Government is also required to observe and implement the ***United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Gross Violations of international human rights laws and serious violations of International humanitarian law*** which were adopted by the General Assembly of the United Nations - 2005 (resolution number not given). **Articles 1** and **3** require member states to ensure and implement international humanitarian law as provided for under the respective bodies' law such as treaties, customary international law and

domestic laws. In this context, the impugned Government actions contravened the underlying spirit of the SADC Treaty itself which, under **Article 23**, requires stakeholders' involvement and cooperation in the matter of regional integration; particularly in matters which affect the stakeholders -failure to consult, pertaining to the suspension; and eventual removal of access to the Tribunal, violated the fundamental rights of members of the Petitioner.

Reliefs;

It is argued that Court has wide powers and discretion under **Article 30(5) of the Constitution and section 13 of the Act (Cap.3 RE 2002),** to grant appropriate reliefs in appropriate cases. We were referred to the Indian Case - **Jorsinghv Attorney General (1997) 3LRC 333** at **334**:

> "*...there is no limitation on what the court can do. Any limitation to its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well, if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the court itself instead of being of the protector, defender and guarantor of the Constitutional rights, it would be guilty most serious betrayal.*"

In **Basu v. State of West Bengal (1997) 2 LRC 1** at page **22**, the Supreme Court of India held:

> "The ***courts have the obligation to ratify the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. A court of law cannot close its consciousness and aliveness to stark realities***."

It is submitted that in this event, the respondents acted oblivious to the matter pending before Court and fettered the Petitioner's rights and would like the Court to grant additional reliefs consequential to those actions - under clause 8 "***other and further reliefs as the Honourable Court deems fit.***' –**Zuberi Augustino v Ancent Mugabe (1992) TLR 137; Sanyo Service Station Ltd v BP Tanzania Ltd and Another, Civil Case No. 329 of 2002 (unreported) and Christopher Mtikila v Attorney General (2006) TLR 279 at 312.**They therefore seek for the following additional reliefs:

> i) *The Government should withdraw its signature to and denounce the new SADC Tribunal Protocol adopted on 18 August 2014 at Victoria Falls in Zimbabwe because it is in conflict with the Constitution.*
>
> *ii) The Government should put in place mechanisms to ensure that Tanzanians have access to the SADC Tribunal in compliance with the provisions of the Constitution.*
>
> *iii) Declaration that the Government has failed to fulfil its mandate and perform its obligations under the Constitution, particularly under **Articles 13(1)(3)** and **(6)(a)**. Consequently, the petition* [*be*] *granted with costs.*

<u>The Respondents' case</u>;

The petition was filed on the allegations that the respondents contributed or did not take adequate measures to prevent the decision of the SADC Summit of Heads of State or Government, to review the jurisdiction of the SADC Tribunal, and to amend the Tribunal Protocol. It is on that basis that it is alleged that the impugned Government actions violate **Articles 13(1), 13(3)** and **13(6)(a)** of the Constitution, **Articles 3** and **7** of the African Charter on Human and People's Rights, **Articles 18**

and **19** of the Tribunal protocol; and, the UN basic principles and guidelines on the rights to a remedy and reparation for victims of gross violation of international human rights law and serious violations of international law.

While the petition was pending, a month after the petition being filed in the Court, the SADC Summit adopted the New Protocol for the SADC Tribunal. It is submitted therefore that the allegations that the respondents contributed or did not take adequate measures to prevent the decision of the Summit review of the jurisdiction and amendment of the protocol had been overtaken by events –**General Manager: Williamson Diamond Ltd v Cletus Swila (2001) TLR 148** –there has to exist a matter in actual controversy which the court then undertakes to decide as a living issue. Refer also to **Mafuru Magwega v Manyesi Munema (unreported).**

It is contended that the decision of the Summit cannot be changed or proclaimed to be "*outrageous*" by any other body or authority not even by this court. It is the supreme policy making institution of the SADC –**Article 10(1) of the SADC Treaty**. **Article 10(2)** gives responsibilities for the overall policy direction and control of the functions, to the same Summit. Pursuant to **Article 10(8)**, "***decisions of the Summit are by consensus and shall be binding***". Furthermore, **Article 16(2)** clearly provides that the composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a protocol adopted by the Summit. The decision of the Summit to postpone the operations of the SADC Tribunal and adopting a new protocol; was made within its powers pursuant to **Article 10(1)(2)(8)** and **16(2)** of the SADC Treaty. It is submitted therefore that this court has no jurisdiction to overturn the decision. The SADC Tribunal no longer has jurisdiction over disputes between natural or

legal persons and the States party to the Treaty. It has only remained with jurisdiction of the SADC Treaty on Protocols relating to interstate disputes.

It is argued that the Government fulfilled its obligations under **Articles13(1)(3) and 6(a)** of the Constitution, by safe-guarding access to municipal courts and by putting in place mechanisms which ensure access to justice for individuals and communities. Pursuant to **Article 30(3)** of the Constitution and **sections 4** and **5** of the Act, Court is granted jurisdiction to receive and determine matters relating to any alleged violations of **Articles 12-29**, with a right to further appeal to the Court of Appeal of Tanzania - the highest court.

Similarly, it is submitted, such access is available to the people of Tanzania in relation to human rights in the East African Court of Justice, as well as the African Court of Human and People's rights in accordance with the limitations attached to such jurisdiction by the establishing treaties. The word '*Court*' in **Article 13, -(3)** and **(6) (a)** as defined in **Article 151(1)** of the Constitution does not include the SADC Tribunal as submitted by the Petitioners. **Article 151** should be read together with other provisions of the Constitution -in the context, **Articles 1, 2(1), 4(2)** and **107A(1)** which proclaim the territory and territorial limits of the United Republic of Tanzania and enshrine the doctrine of separation of powers among three pillars of the State. The Court is invited to find that under the Constitution, the Courts' authority to dispense justice does not extend to the SADC Treaty or the SADC Tribunal. The Tribunal Protocol as amended does not confer jurisdiction to the Tribunal to deal with individual claims against States, and as such, the claims based on alleged violations of **Articles 13(1), (3)** and **(6) (a)** of the Constitution are in this context not tenable.

On the alleged violation of **Articles 3** and **7** of the African Charter on Human and Peoples' rights; **Articles 18** and **19** of the SADC Tribunal Protocol; and the UN Basic Principles and Guidelines on the rights to a remedy and reparation for victims of gross violation of international human rights law, it was submitted that: In **Luke Manyandu Tembani and Benjamin John Freeth v. Angola and 13 Others Communication no 409/2012,** (" the ***Tembani*** Case"), the complainants had alleged before the African Commission on Human and People's Rights that the acts and omissions of the Respondent SADC States leading to the suspension of the SADC Tribunal amounted to violations of the provisions for the African Charter. The Commission declined to exercise jurisdiction - paragraph 142:

> "The ***Commission takes the view that article 7 of the charter does not impose an international obligation of the respondent States to ensure access to SADC Tribunal and thus find there has been no violation of.***" --Article 7(1) (a) of the Charter.
>
> The commission held further at paragraphs. 138-140 that;
>
> "***The access envisaged in that article is access to national courts within the domestic legal system of the State parties to the charter. The charter imposes obligations on such States to ensure right to a fair trial at a national level.***"

It was submitted therefore that the same reasoning would hold true with respect to **Articles 3(1)** and **(2)** of the Charter leading to the conclusion that the Charter only imposes obligations on the State parties to ensure *equality before the law*; and the guarantee *to equal protection* under the law is limited to national legal systems. **Articles 18** and **19** of the old Protocol have no relevance as far as the Attorney General is concerned –"***since the old protocol is inoperative***".

While it is admitted that **Articles 1** and **3** of the UN Basic Principles as adopted by the General Assembly in 2005 reiterated the treaty obligations of member States to respect, ensure respect for and implementation of international human rights law and international humanitarian law as provided for in treaties to which the State is a party; including customary international law and domestic law of each State; as well as the scope of obligations; such compliance, has in relation to Tanzania been accomplished; through inclusion of the Bill of Rights in the Constitution and enforcement mechanism –the Act. By the same token therefore, international human rights law and humanitarian law norms have been implemented; under domestic laws which provide protection to the extent required under international law obligations.

For the above reasons, the court is invited to dismiss the petition in its entirety, with costs.

Rejoinder

There is no dispute that the Government participated in all steps leading to the new SADC Tribunal Protocol, for the purpose of denying Tanzanians, the fundamental right of access to justice to the tribunal which was already availed to them. Those actions were in contravention of the Constitutional provisions. That decision is exactly the cause of the complaint. The reply by the learned Principal State Attorney affirms the allegation that the Government's decision was deliberate. Since it is admitted that the impugned acts terminated existing rights, it cannot therefore be successfully argued that the petition has been overtaken by events in view of **Article 26, - (2),** and **30, - (3),** of the Constitution read together with **section 5** of the Act. The petitioner is permitted to allege and complain that any of his rights pursuant to **Articles 12-29** of the Constitution ***"has been, is being or is likely to be contravened."*** In this

context, the denial of such a fundamental right is admitted. The petitioner is entitled to a remedy from the Court.

The cases cited by the learned Principal State Attorney are distinguishable. In ***General Manager: Williamson Diamond Ltd v Cletus Swila***, supra, the subject matter was a temporary injunction pending hearing and determination of the main suit. In ***Mafuru v Muhema*** the applicant was seeking for an order for stay of execution of a decree. The petitioner is not challenging the decision of the SADC Summit, nor seeking from the court an order –to overturn or declare the decision invalid. **What is challenged is the Government's decision to take part in any act suspending and/or disbanding the SADC Tribunal. That decision was in contravention of the specified provisions of the Constitution.** The allegations are set out in paragraphs 5,6,7 and 8 of the petition. The issue of challenging the decision of the Summit is not founded on the pleadings.

The impugned Government actions were taken with its full knowledge that determination of the issue was pending in this court. "*This is not the first time for the Government of the United Republic of Tanzania to take an action intended to defeat the effect of the decision of the High Court of Tanzania, before or after such High Court decision is taken*". In Attorney **General v. Christopher Mtikila (1998) TLR 100,**the Court of Appeal of Tanzania commented on such incident with disapproval -pages 103-104.

The argument by the learned Principal State Attorney that "*access to justice*" envisaged in international law is access to domestic courts, is not tenable. **Article 13.-(3)** and **6(a),** read together with **Article 151** of the Constitution, leads to the conclusion that, the SADC Tribunal is one of the courts having jurisdiction in Tanzania *as part of the national dispute settlement mechanisms*. Subject to prior exhaustion of local

remedies, an aggrieved Tanzanian had the right of access to the SADC Tribunal. The opinion of the African Commission in the ***Tembani Case*** cannot control or override the provisions of the Constitution; the opinion is not binding on the court. The ***Tembani Case*** was not interpreting provisions of the Constitution. In the circumstances, the petition should be granted.

Consideration and resolution of issues:

Clarification of the context;

Admission of the impugned acts and the brief attention given to the matters in contention –evident in the Respondent's submissions, tends to present a picture that the issues under controversy are simple. They are not. There are serious implications arising out of matters of law and fact apparently taken for granted by the parties, which may cloud judicious analysis of the matter before the Court. For instance it is not correct, as a matter of fact and law that the first SADC Tribunal Protocol, was effectively repealed and that the "*New Protocol*" has come into operation as submitted. Fortunately, the Final Report by WTI Advisors, the consultants commissioned by SADC on the "***Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal" dated,*** March 2011 and attached to the Petition –*Annexure TLS-3,* provides a clear insight on the context of the impugned actions, and from that perspective one gains a clear understanding of the ***status quo*** before and after the actions of the State Parties, and their respective obligations under the Treaty. We have also found guidance and enlightenment from judgments of persuasive value from other Courts in the SADC Region in matters similar to, or arising out of the same context; and interpreting the consequences of the impugned acts –in the context of their respective Constitutions and jurisdictions. We have come to the firm conclusion that;

(a) The SADC Tribunal as established under the Treaty is still subsisting, as an international court; duly established in accordance with **Article 9 - (1) (g)** of the SADC Treaty, as one of the integral institutions of the Community. However, owing to the impugned decisions it is not duly **'constituted'** contrary to the mandatory terms of **Article 16 (1)** of the Treaty. According to the report –page 24, there are three main provisions establishing the jurisdiction the jurisdiction of the Tribunal –Articles **16 (1)**, and **32** of the Treaty; and **14** of the SADC Tribunal Protocol. These must be read cumulatively –**Electricity Company of Sofia and Bulgaria (Belgium/Bulgaria) [1939] PCIJ series A/B, No. 77,76.**

(b) In accordance with **Article 16 (2)** of the Treaty –"***...the composition, power, functions, procedure 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 the treaty adopted by the***" Summit. It is our understanding that the provision makes a special exception --distinguishing the Tribunal Protocol from other Protocols made under Article 22. In the context of this case therefore, the Tribunal's jurisdiction in Article 14 of the Tribunal Protocol is deemed to have been established under the Treaty; the Protocol is read as a constitutive part of the Treaty. Any amendment to the Protocol as admitted by the Respondents amounts to an amendment to the Treaty. Such amendment must therefore conform to the Treaty.

(c) By resolution of the Summit in August 2010, the operations of the Tribunal were suspended and the Tribunal prohibited from receiving new cases pending review commenced at the instance of

the Republic of Zimbabwe - challenging the legality of the tribunal - Annexure TLS - 1.

(d) Suspension was further implemented by either refusal or failure by SADC to appoint Judges to fill the 10 vacancies as and when they fell due. In that event therefore all three jurisdictions of the Tribunal were placed in abeyance.

(e) The " *new Tribunal Protocol*" is subject to ratification and can only come into operation upon ratification by at least 10 Members; and in Tanzania ratification in relation to the Treaty must be by resolution of Parliament pursuant to Article 63 (3) (e) of the Constitution.

(f) Only 9 States had signed the protocol as at the time of preparing this judgment. Six States - Angola, Botswana, Madagascar, Mauritius, Seychelles and Swaziland had not signed. In South Africa, the Gauteng High Court at Pretoria –**Law Society of South Africa and Others v President of the Republic of South Africa & Others, Case No. 20282 of 2015** - held (para. 71);

> "***South Africa remains bound by the 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. If it was the intention to withdraw South Africa's obligations under both the Treaty and the Protocol, consent of Parliament had to be obtained first. Failure to do so in the present context is unlawful and furthermore, irrational. It is declared that the first respondent's participation in suspending the SADC Tribunal and his subsequent signing of the 2014 protocol of the SADC***

Tribunal is declared unlawful, irrational and thus, unconstitutional."

(g).According to the Vienna Convention on the Law of Treaties, once a treaty has been concluded among the parties it becomes binding and must be performed in good faith. Tanzania is a dualist country in its approach to ratification of international treaties– every treaty is liable to ratification by Parliament. Consequently until ratification of the '*new SADC Tribunal Protocol*" by Parliament, the existing Tribunal Protocol is still valid and forms part of the domestic law of this country. In that context therefore the petitioner's allegation that the process did not involve the people as interested stakeholders as required under the Treaty, was in the Tanzanian context premature, since determination of the public interest is a legislative function – **The Honourable Attorney General V Rev. Christopher Mtikila, Civil Appeal No. 45 of 2009, Court of Appeal of Tanzania (Full Bench unreported**) ("***Rev.Mtikila*** 3").

(g) Suspensions of a functional international Tribunal to which jurisdiction Tanzania had already submitted –**United Republic of Tanzania v Cinemaxpan (Mauritius) Ltd and 2 Others Case No. SADC (T) 01/2009** is not a policy decision but a definitive action attributable to SADC as an International personality.

(h). It is a basic principle of international law that a party that treats a treaty as valid is later precluded from denying its effect -**Arbitral Award (King of Spain) 23 December 1906; (Honduras/Nicaragua) (1960) ICJ Rep 192 209.** Under International law a national court is considered to be an organ of State - **Article 4** Vienna International Law Convention. As such this Court is bound to abide with the Treaty. To that end; the

interpretation of a Treaty norm is a judicial and not an executive function; the impugned decisions, which were founded on a contention of the legality of the Tribunal by one of the State party, before a Council of Ministers, related to interpretation of a treaty norm.

In **Government of the Republic of Zimbabwe v. Fick** (supra), it was held at para 71:

> "When ***the farmer's rights to property, their human rights of access to court in particular were violated, Zimbabwe was, in terms of article 6(6) of the amended treaty (SADC) obliged to co-operate with the Tribunal in the adjudication of the dispute. After the tribunal had delivered its judgement, Zimbabwe was duty-bound to assist in the execution of that judgement and so is South Africa.***"

We are in respectful agreement with that decision as one carrying persuasive value in this Court. Member States were at all material times bound to implement the Treaty in good faith.

(i) In the ***Tembani Case,*** supra, at para. 52, Tanzania had submitted that in regard to the issues raised by the Complainant regarding access to the Tribunal, they were –

> "***issues which can be raised and dealt with at the level of the SADC as an international organisation and a sub-regional organ, which has been given exclusive jurisdiction to deal with such community issues***" -citing ***The Matter of Efoua Mbozo'o Samuel vs. The Pan African Parliament.*** **Application No.010/2011.**

In our considered opinion such jurisdiction was vested in the SADC Tribunal under the Treaty and not in the Council of Ministers. At the domestic level the doctrine of separation of powers is incorporated in Article 4 of the Constitution. Sub –article (4) provides;

> "***(4) Each organ specified in this Article shall be established and shall discharge its functions in accordance with the other provisions of this Constitution.***"

Consequently , the process of negotiating and entering into international treaties is an exclusive territory of the executive –**Article 51.-(2;** legislative function necessary to bring such a treaty into purview of the domestic laws – Parliament of Tanzania –**Article 63.-(3) (e);** once a treaty comes into force, it should be performed in good faith. In case of any dispute arising between the implementing parties or third parties recourse is to the international dispute resolution forum designated in the Treaty, other conventions and or international customary law in lieu thereof, the judiciary applying the relevant international law norms as domesticated or otherwise made applicable under the Constitution – **Article 107A (1).**

(j) Thus bound the State parties including Tanzania are obliged to give effect to the Tribunal, without which the existence of the Community itself remains doubtful. Peaceful settlement of any dispute is rendered impracticable. Pending re-opening of the doors of access to the Tribunal, recourse is to the national courts - **Law Society of South Africa and Others v President of the Republic of South Africa, Case No. 20382/2015 (Gauteng High Court, Pretoria)** para.71 (supra).

However, in Tanzania, the Courts have taken a rather cautious approach in intervening with the exercise of power by the other organs of State. This we believe is due to the fact that the Constitution only allows

litigation in relation to first generation human rights –Bill of Rights **Articles 12-29**. Fundamental objectives and directive principles of State policy cannot be enforced in our courts –**Article 7(2).(2)**;

> "***The provisions of this part*** are ***not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law, or judgment complies with the provisions of this Part of this Chapter***".

In this regard the SADC Treaty can be observed to be a step ahead of the Constitution to the extent of the remedies extended to natural and other persons not available in domestic courts. A remedy based on those rights may correctly be said not to be available except through domestication of the Treaty. Under international customary law, SADC law is international law; as such binding on State parties. However, the Treaty does not expressly claim supremacy over the Constitution; and therefore until amended, Court is bound to abide with the Constitution. In that event the otherwise sound context of the South African decision is in this event distinguishable; to the extent that it explicitly declares similar executive acts impugned in this case, unconstitutional on the basis of illegality and irrationality. In ***Mhozya Mwalimu Paul John v A.G (No.1) (1996) TLR 130 (HC)*** –cited with approval by the Court of Appeal in ***Rev. Mtikila 3***, supra we held;

> "(iii) ***The principle that the functions of one branch of government should not encroach on the functions of another branch is important to ensure that the governing of a State is executed smoothly and peacefully***".

In that case the Petitioner had applied for among others an order restraining the President of the United Republic from performing a

certain function which the applicant had apprehended would have abrogated his rights under the Constitution. Although in ***Rev. Mtikila 3***, the Court of Appeal was confining itself to the Constitutionality of the powers of this Court; to either declare an Article of the Constitution to be unconstitutional, on the basis of being inconsistent with the general purpose of the Constitution read as a whole; or for the same reason, decline to give effect to such Article, in order to give effect to another Article protecting human rights; we believe in the course of doing so it also set out the following guiding principles –

(a) In performing its Constitutional function of maintaining checks and balances the High Court or the Court of Appeal as the case may be, can in a proper case find any act legitimately made by either of the other organs, unconstitutional; not in case of apparent conflict between Articles of the Constitution, but on the basis that the process leading to that action was not made in accordance with the Constitution and therefore is unconstitutional; and

– (b) The Court has no powers to disregard or refuse to give meaning to any provision of the Constitution

–(c) In case of inconsistency, the court is bound to harmonise the conflicting articles of the Constitution.

Resolution of the specific issues;

Whether access to justice as guaranteed in Article 13(1), (3) and (6) (a) of the Constitution; and the international human rights law instruments, is only confined to access to domestic courts.

It is our considered view that from our understanding of the directive principles of the Constitution –**Articles 7** and **8** as observed earlier on, the Government –internally and externally, exercises a delegated Sovereignty and as such must exercise its authority within the four corners of the Constitution - **Okunda and Another v. Republic (1970) EA** supra, **at p.456** "***a state signs a treaty in the full knowledge of its contents and in full knowledge of its laws and legal policy.***"; and **Reid v Covert**, (supra).

It is common ground that **Articles 13.-(1), (3)** and **6(a)** of the Constitution enshrine the principles of the rule of law as a foundational value of the Constitution. It is also beyond argument that same principle is an integral part of the SADC Treaty as we have elaborated above. The cases cited to us would apply to the interpretation of the Treaty. **Article 13.-(3)** in particular entrenches one of the cardinal tenets of the rule of law –**access to justice before independent courts or tribunals -Julius Ishengoma Francis Ndyanabo v. Attorney General (2004) TLR 14** at pages**33** and **34** (supra). "***Access to courts is undoubtedly a cardinal safeguard against violations of one's rights whether those rights are fundamental or not. Without that right, there can be no rule of law, and therefore, no democracy***".

We have already held that while this court has no mandate to question or put on hold the exercise of the prerogative of the executive to negotiate international treaties, it is the Constitutional function of this Court to maintain checks and balances between actions and powers exercised by all State organs to test conformity with the Constitution– ***Mwalimu Paul Mhozya v. A.G (No.1); Rev Mtikila. 3*** supra, at page 42.There are indeed some notable differences between the underlying meanings in the English version in relation to the relevant Articles cited

in Swahili by the Petitioner; and profoundly others relevant to this determination.

Article30(3) of the Constitution (Swahili) provides:

> ***"(3) Mtu yeyote anayedai kuwa sharti lolote katika Sehemu hii ya Sura hii ya Katiba au sheria yoyote inayohusu haki yake au wajibu kwake, limevunjwa, linavunjwa au inaelekea litavunjwa na mtu yeyote popote katika Jamhuri ya Muungano, anaweza kufungua shauri katika Mahakama Kuu."*** (Underlining supplied)

The equivalent in English reads:

> ***"(3) Any person alleging that any provision in this part of this chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic of Tanzania may institute proceedings for redress in the High Court."*** (Underlining supplied)

In our view there is a serious issue of construction in the context of this case arising out of the words "***sharti lolote***" and the chosen English words "***any provision***" and secondly "***na mtu yeyote popote katika Jamhuriya Muungano***"–correctly translated in the English version -"***by any person anywhere in the United Republic.***"The nearest English–**TUKI Kamusi ya Kiswahili-Kingereza Dictionary[2014]**word equivalent to " ***sharti***"in this context is a " **a condition in law**" –an express duty or obligation inuring benefit upon another person or obligation to be performed or fulfilled –**Oxford Advanced Learners Dictionary 6th Ed**. Hence in our view the corresponding Act -Rights and Duties Enforcement Act [**Cap. 3 R.E2002**]. "**Provision**" used as a legal term is (noun) -***a clause in a legal instrument or law***.

Transposing this meaning as presently applied in the English version, leads to a meaning which is at variance with the intended meaning intended by the Constituent Assembly. The correct translation would be "***any duty owed to him, or obligation to be discharged by or in relation to him***". In our considered view the intention of the Constitution is to enforce the substantive rights and duties thereby protected –spirit and utility of the law, and not the letter –provision of the law.

We are of the firm view that in the second part, the Constitution limits the territory of enforcement to acts by persons resident in or present in and within the territory of the United Republic in conformity with the principle of Sovereign territorial limits. However, State actions conducted outside its territory are deemed to be within its territory. In **Glenister v President of South Africa and Others, 2011(3) SA 347 [CC],** it was held that the executive cannot perform an act on an international plane such as would be inconsistent with constitutional obligations –doing so amounts to acting unreasonably. Reasonableness in such context entails the obligation that there must be a justifiable basis for decisions of the Government. The decision of the United States Supreme Court –**Reid v Covert**; (supra), cited to us by Petitioner's Counsel, which involved a trial of an American civilian in a US Military Tribunal in a foreign country, contrary to a Constitutional prohibition confirms this position.

It is our considered view, that read together with Article 26 (2) the special procedure prescribed under **Article 30.-(3)** is not the only means available to either an injured or other interested party; for either seeking remedy in the ordinary course, or relating to preservation of the Constitution or any other law, rather, it specifically creates a special right of action; to a specific person-individual; in specified

circumstances –violations of the rights enshrined in **Articles 12-29**, ***without prejudice*** to all other means of redress available under the law.

The question which needs to be asked therefore is; **why the special dispensation in relation to human rights**? The answer, we believe, will enlighten us on the issue **whether the protection and access thereby provided extends to International Tribunals as contended and if not, whether there are other effective remedies.**

Article 30.-(4) provides;

> "*(1) Subject to the other provisions of this Constitution, the High Court shall have original jurisdiction to hear and determine any matters brought before it pursuant to this Article; and the state authority may enact legislation for the purpose of-*
>
> > *(a) regulating procedure for instituting proceedings pursuant to this Article;*
> >
> > *(b) specifying the powers of the High Court in relation to the hearing of proceedings instituted pursuant to this Article;*
> >
> > *(c) ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with this Constitution."*
> > (Emphasis ours)

The above - English rendering of the Constitution, correctly conforms to the Swahili version. It is pursuant to this Article that, as correctly submitted by learned Counsel for the respondents that the Basic Rights and Duties Enforcement Act, [Cap.3 RE 2002] was enacted. Section 2 of the Act provides that it shall apply in relation to all suits the cause of action of which concern **Articles 12-29** of the

Constitution. Properly construed, Article **26(2)** preserves the general right of action to include acts aimed at preserving or protecting the constitution and laws of the land. Such acts include but are not limited to an action in a court of law. The constitution therefore guarantees the right of any person to take measures aimed at preserving, protecting and ensuring adherence to the rule of law as enshrined in the Constitution through various means subject only to procedures provided by law.

Article 30.-(5) deals with "***Where in any proceedings***" –captured emphatically in the *Swahili* version; "***Endapo katika shauri lolote inadaiwa...***" -issues of any law or actions being inconsistent with the Constitution arise, in the course of settling other disputes before courts of law..; -for clarity, let us reproduce **Article 30.-(5);**

> "***Where in any proceedings it is alleged that any law enacted or any action taken by Government; or any other authority abrogates or abridges any of the basic rights, freedoms and duties set out in Articles 12-29 of this Constitution, and the High Court is satisfied that the law or action concerned to the extent that it conflicts with this Constitution, is void, or is inconsistent with this Constitution, then the High Court, if it deems fit, or if the circumstances or public interest so requires, instead of declaring that such a law or action is void, shall have power to decide to afford the Government or other authority concerned an opportunity to rectify the defect found in the law or action concerned within such a period and in such a manner as the high court shall determine, and such law or action shall be deemed to be valid until such time the defect is rectified or the period determined by the high court lapses, whichever is the earlier.***"

In our view, the 'Swahili' version of the sub-article above, in the words "***endapo katika shauri lolote inadaiwa kwamba sheria yoyote iliyotungwa au hatua yoyote iliyochukuliwa na Serikali au mamlaka nyingine inafuta au inakatiza haki, uhuru na wajibu muhimu zitokanazo na ibara ya 12 hadi 29 za Katiba hii...,***" is consistent with the interpretation we have attached to the two **Articles**, **-26** and **30** within the context of enforcement of fundamental human rights. That is to say, **Article 26** (2) does not create any right; but simply preserves the right to seek remedy, including the right to challenge legality – Constitutionality of State actions and legislations. But in case of such issues arising before another court other than this Court (special constitutional jurisdiction), then such issue shall be referred to this Court for determination; in that context, **Article30.-(4) (c)**, makes good sense. It requires Parliament and the Chief Justice to make necessary amendments to the law and rules, respectively, to accommodate this arrangement; to regulate the reference by any other court seized with such matter in the ordinary course, to this Court. For, as observed earlier on, the State and the Judiciary as part thereof are bound to do what the Constitution and the law of the Country provide – the ***Attorney General v Lesinoi Ndesinai***, supra at page **228.** In lieu of a clear procedure governing proceedings outside **Article 30(3)**, recourse is had to **Article 26 (2)** as has been the practice of this Court.

In **Julius Ishengoma Francis Ndyanabo v. Attorney General Civil Appeal No. 64 of 2001,** it was established that it is a cardinal principle of Constitutional interpretation to read the entire constitution as an entirety. In **Christopher Mtikila v. A.G (1995) TLR 31** at page **66,** cited with approval by the Court of Appeal in ***Rev Mtikila 3***, supra, this Court, *Lugakingira, J* (as he then was) held:

> ***"What happens when a provision of the Constitution enacting a fundamental right appears to be in conflict with another provision in the Constitution? In that case the principle of harmonisation has to be read in an integrated whole, no one particular provision destroying the other but each sustaining the other..."***

However, as noted earlier the rule in ***Rev Mtikila 3***, supra, emphatically requires Court in such an instance to follow the clear words of the Constitution -they cannot be disregarded. In **Rev Mtikila v AG (2006) TLR 279-310** the court stated:

> ***"...we have no doubt that international conventions must be taken into account in interpreting, not only our constitution but also other laws, because Tanzania does not exist in isolation. It is part of a community of nations. In fact, the whole of the Bill of Rights was adopted from those promulgated in the Universal Declaration of Human Rights."***

The Universal Declaration of Human Rights is essentially a Memorandum of Understanding between Governments and the people; that *human rights shall be protected by the rule of law, ...and by progressive measures, national and international, to secure their universal and effective recognition and observance both among the peoples of member states themselves and among the peoples of territories under their jurisdiction* –Preamble to the UDR. The inclusion of the Bill of Rights in the Constitution is an example of a national measure towards fulfilment of that universal ideal or standard. The African Charter on People's and Human Rights as acceded to by Tanzania is an international measure –treaty binding on State parties. The same can be said of the SADC Treaty.

Articles 3 and 7 of the African Charter provide;

"*3. (1) Every individual shall be equal before the law.*

(2) Every individual shall be entitled to equal protection of the law.

7. Every individual shall have the right to have his cause heard. This comprises;

(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

(c) the right to defence, including the right to be defended by counsel of his choice;

(d) the right to be tried within a reasonable time by an impartial court or tribunal."

Article 15 of the operative SADC Tribunal Protocol makes a specific distinction between a "natural and legal person" thence – "the ***Tribunal shall have jurisdiction over disputes between Member States, and between natural or legal persons and Member States***". (Underlining supplied)

From the above it emerges that indeed, as submitted by Counsel for the respondents, the promulgation of the Bill of Rights in the Constitution was in furtherance of the UDR and other Conventions and Treaties binding on Tanzania to ensure protection of fundamental human rights of the individual. This is because citizens and residents of a country

cannot opt out the jurisdiction of their National Courts, Executive control and the Legislative ambit of that country; hence the operational framework imposing the strict duty on Nation States, is technically limited to national courts and tribunals within the meaning of the decision in the *Tembani* case (supra) as submitted by the respondent's counsel. For that reason under the Tanzanian context it cannot directly be held in breach of the Constitution in relation to acts of the SADC in this Court pursuant to the cited Articles. However, that does not mean that the State cannot be brought to account through other avenues; for instance, in Parliament at the time of a motion to ratify the amendments to the treaty. Significantly though, under the UDR the State is obliged to ensure observance of the same principles in the conduct of its international relations. In case of a treaty, the obligation arises, not out of Sovereign obligation within its territory; but the binding nature of the treaty obligations under the Vienna Convention, supra. On the same facts, therefore it can be held to be in breach of its Treaty obligations.

We are not in agreement with the view that the obligation arising under the international conventions is (a) limited to national courts, and/or (b) such obligation --equality before the law and access to justice, was definitely discharged by the promulgation of **Article 13.-(6)**, and the corresponding enactment of the Act , [Cap.3]. Our construction of the Sub-article within the context of the UDR, the African Charter and the SADC Treaty, is that;

> (a) The duty imposed on State Authorities at all levels is continuous --aimed at progressive attainment of the expressed ideal – protection of the inherent rights of the **individual** directly; and as may be derived through the **legal person both** domestically and on the international arena.

(b) The rule of law is inherent and imposes an omnipresent duty on the State and its officers in the execution of all their official functions and discharge of their duties.

In **Zondi v MEC For Traditional and Local Government Affairs 2005 (3) 589 (CC)at par. 82**, the Constitutional Court expounded on a corresponding provision of the Constitution of the Republic of South Africa as follows;

> "***The concept of the rule of law embraces at least four fundamental rights; namely, the right to have access to an independent and impartial Court or Tribunal, the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation, the right to equal treatment before the law and the right to equal protection of the law.***" (Underlining supplied).

The SADC Treaty may be viewed as a progressive expansion of access to Justice and furtherance of protection of fundamental human rights and effectiveness of the remedies available by granting locus to the "legal person" as a realisation of economic and social rights derived through a Community aimed at expanding economic interaction among the people of the region.The SADC Treaty – Article 4, entrenches human rights and the rule of law. It imposes a "legal obligation" on SADC as a collective and as individual Members. The obligations and rights enshrined in the Constitution and the SADC Treaty in our view;

(a) **Constitute a legitimate expectation in the people that the exercise of any State authority –including rights and obligations arising of international arrangements; affecting their rights, fundamental or otherwise, is subject to the prior**

existence of the right to access to independent Courts and tribunals –the right to a fair hearing.

(b) The unfettered sanctity of the existence of an independent Judiciary under the Constitution –domestic remedies; corresponds to a similar obligation under Treaty or other international conventions to maintain an effective dispute resolution mechanism of the same qualities: Article 4(c) and (e) SADC Treaty; **Gondo v Republic of Zimbabwe, SADC (T)/05 2008.**

In that context, we are of the firm view that once established; the SADC Tribunal was rendered secure from any control or influence of any State parties, and could not as an independent tribunal be held hostage, to unilateral withdrawal of confidence expressed in a motion challenging its legality by one of the State party, before another institution of the Community. It's juridical and institutional independence was assured by the nominal role given to Summit to elect Judges nominated in accordance with the Treaty. To that end the resolution to suspend operations of the Tribunal; based on a challenge of its legality, or for whatever reasons, eroded existing rights of parties who had at all times material to the impugned decision, acted in relation to the Community in the assurance of the existence of an independent juridical body to which they would turn in case of dispute.

In **Peter Anyang' Nyong'o and Others v The Attorney General of the Republic of Kenya and Others,[2007] EACJ 6,** the Court held that, the right to a fair hearing and access to justice incorporates "*the right to final realisation of the fruits of the litigation by the successful litigant*". A decree or court order is not an end in itself. The end is the effective obtainment of the matter subject of the dispute or in lieu thereof the equivalent remedy prescribed by court. The right therefore

includes the post decree rights, which are administered by the court or tribunal issuing the decree or order.

In our considered view which is evident in the decision of the South African Courts in the ***Fick*** cases, (supra), the suspension of operations of the SADC Tribunal would border to an outright abrogation of the people's rights, contrary to the Treaty. In this case Members of the Petitioner, like similar professionals in other fields in the Region, have vested interests and rights at different levels, as citizens of the region. In particular as legal practitioners; entitled to appear before the Tribunal in their representative capacity; but also as potential employees of SADC and its affiliate institutions as such entitled to equal protection of the law. In the absence of a functional Tribunal, the rule of law in the internal management of SADC and its institutions would be nothing but a pipe dream.

Observed from this context; and Tanzania's submission in the ***Tembani Case***, supra; the effect of the decision of the African Commission would not be; to exclude jurisdiction of this court, as submitted by counsel for the respondents. Rather, the ruling is to the effect that Heads of State acting in the SADC Summit are not capable of being held collectively accountable *qua* SADC Summit before any international forum; such action, is the action of SADC *per se* as an international organisation on which the Commission could not exercise jurisdiction in accordance with the Charter which binds only Sovereign States. The result is that upon suspension of the Tribunal, the State parties rendered themselves liable to action for SADC acts in the domestic courts as discussed earlier on, on the principle that SADC law is part of the domestic law.

Conclusion;

1. In terms of **Article 16-(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***". Failure or refusal to appoint new Judges to the Tribunal contravenes the mandatory duty imposed on the appropriate body to constitute the Tribunal. Without a functional tribunal both SADC and the individual State parties expose themselves to the danger of liability to third parties in the absence of; the advisory, enforcement; and adjudicative institution. Undermining the operational capacity of the Tribunal, is inimical to the rule of law as a foundational principle for the protection of human rights, democracy and good governance underpinning the Community established under the SADC Treaty. Such action violates the fundamental tenets to a fair hearing – before an independent tribunal as entrenched in ; **Articles 4-(c)and (b), 6 -(1) and (6), 9(g), and 16(1)** of the Treaty; and other international treaty obligations.

2. The suspension of the SADC Tribunal, opened doors of access by aggrieved parties to seek remedy in domestic courts of competent jurisdiction, and as such the irrational attempt to fetter the operations of the Tribunal limited, but did not abrogate the right to access to justice *per se*. A party aggrieved by failure to execute any existing judgment decree or order can resort to domestic courts.

3. Tanzania is bound under the Treaty to give it effect in good faith – Article 6. In terms of Article 16.3 of the Treaty; "*Members of the Tribunal shall be appointed for a specific period*"; in our view this ensured security of tenure and independence of the Judges; and read [redacted] individual actions of State

4. The State parties were not obliged to sign the impugned resolutions merely because –all decisions are made by consensus –**Articles 10 (9)** of the Treaty; as submitted by the learned counsel for the respondents. We are in an agreement with the view expressed in the Report (by the SADC Consultants), page 6; that it is settled law –international law of organizations: '*consensus*' means, the adoption of a decision without formal opposition. A state party can either opt to abstain, or to *veto* the decision. The Government is therefore at liberty to review its position with a view to conforming to its Constitutional obligations; and the binding nature of its international Treaty obligations.

5. Further, under the Treaty, the legitimate body with mandate to advise the Community is the Tribunal. Consequently failure to "constitute" - appointing Judges, and facilitating the Tribunal, undermines the legitimacy of all acts done by the Community subsequent to the effective date; and as observed earlier exposes State parties to individual liability for all acts of SADC in the domestic courts of competent jurisdiction.

6. The Government should be guided by the principle of proportionality- **Julius Ndyanabo v Attorney General [2004]TLR 14 at page 42,** supra; to establish whether the dire state outlined above, was what was intended when it subscribed to the impugned actions relating to suspension of; and refusal to appoint Judges to; the Tribunal.

7. In view of the clear position we have outlined herein before, – striking a delicate balance between upholding the doctrine of separation of powers, and the Courts' mandate to maintain checks-and-balances, Court is constrained not to interfere with the transient functions of other organs in this case. In particular;

(a) The proposed amendment to the Tribunal Protocol, by the impugned "New *Tribunal Protocol*", calls for an amendment of the

Treaty and as such, subject to ratification by Parliament; all concerns, fears and apprehensions expressed by the petitioner regarding consultation and determination of the public interest, can always be dealt with when or before the matter is placed before Parliament. For that reason, the remedies prayed for under items 1, 4 and 6 of the original remedies; and, items (i), (ii) and (iii) of the prayers for additional orders are hereby rejected.

(b) Under the SADC Treaty, as is the case under the East African Community, Tanzania is obliged to work towards harmonizing its domestic laws to bring them in conformity with the respective treaties. It is therefore not difficult to foresee the possibility of conflict of laws arising out of taking two mutually opposing positions on the same issue, in similar circumstances – access by individual and legal persons to regional Courts/ Tribunals; as submitted by the petitioners. However, we are of the considered view that the Petitioner and the Attorney General have more effective channels --dialogue and mutual consultation, to come up with workable resolution of the apparent impasse; they are in position to advise the relevant organs accordingly pursuant to their respective mandates and in **Article 26(2)** of the Constitution.

(c) The principle of separation of powers is based on the underlying principle that the three pillars are acquainted with actual knowledge of the operational framework of their duties and functions. All laws are passed by the Legislature pursuant to policies formulated by the Executive, which also ensures the coordination of the implementation of the laws. The Judiciary as the adjudicator and dispute resolution arm of the State does not act on its own motion in any matter. Its duty is to receive and determine matters presented before it. For that reason it is an

underlying presumption to the rule of law reduced to the dictum ***res subjudice;*** that upon notice of pendency of a matter before a Court of law other organs of State would take caution not to disturb the ***status quo.*** There are many good reasons underlying this rule. We will here point out only one; in **Attorney General V Rev. Christopher Mtikila [1998] TLR 100 at page 104**, supra the Court of Appeal noted:

> "***Thus the Government consciously and deliberately drew the Judiciary into a direct clash with Parliament by asking the two organs to deal with the same matter simultaneously. For, as it turned out, that exercise ended up producing two conflicting results, the court upholding the right of private candidates to stand for Presidential, parliamentary and local councils elections on the one hand, and parliament barring such right on the other. Such a state of affairs was both regrettable and most undesirable. It was wholly incompatible with the smooth administration of justice in the society, and every effort ought to be made to discourage it. Once the Government decides to pursue or to have a matter pursued through the courts of law, it should desist from pursuing another line of remedy in respect of the same matter until the court process has come to finality. In the instant case, had the amendment been initiated and passed after the court process had come to finality, that in law would have been all right procedurally, the soundness of the amendment itself, of course, being entirely a different matter. Then the clash would have been avoided. Indeed that would be in keeping with good governance which today constitutes one of the attributes of a democratic society.***"

In this case pendency of this case would have been the reason for the Respondents to abstain from voting on the impugned actions in the SADC Council and Summit the very impugned actions pending determination by this Court.

The Petition partly succeeds to the extent outlined above.

Remedies;

1. The suspension of the operations of the SADC Tribunal; and failure or refusal to appoint Judges contrary to the clear Treaty provisions, was inimical to the Rule of law as a foundational principle inherent to the legitimacy of the Community; and as expressly entrenched in the Treaty. Respondents are enjoined pursuant to the respective Treaty obligations; to give effect to the Treaty.

2. The resolution to replace the existing SADC Tribunal Protocol is technically –law and fact, merely a proposal to amend the Treaty; as such it is subject to ratification by Parliament. Under the Principle of separation of powers, it is rather premature for Court to rule on the legality or otherwise of the process which is still in the territory of the Executive pending presentation to the Legislature. All issues relating to participation and involvement of stakeholders relating to the proposed amendments can always be dealt with at the level of the Legislature in accordance with its procedures.

3. In the absence of a functional Tribunal as duly established as a constituent institution under the Treaty; dressed with jurisdiction under Articles 16, 32 of the Treaty; and Article 14 of the Tribunal Protocol, the legitimacy of SADC as a Community and international personality is in jeopardy. The respondents are enjoined to advise Government to consider a review of its position.

4. Pending reopening doors of the suspended SADC Tribunal, the High Court has inherent powers to entertain all adjudicative disputes between individual and legal persons against the Government of Tanzania in matters arising out of the SADC Treaty.

5. Each party to bear their costs.

Order accordingly.

S. A. LILA,

PRINCIPAL JUDGE.

A. K. MUJULIZI,

JUDGE.

S.B. BONGOLE,

JUDGE.

Delivered at Dar es Salaam this 14th day of June 2019

..... **~~Registrar~~/Deputy Registrar.**

04/6/2019

Coram: Hon. Magutu Dr.

For Petitioner: Mr. Daimu Halfani and assisted by Loveness Denis and Neema Mhina Advocates

For Respondent: Ms. Luciana Kikala State Attorney

CC:Rehema.

Mr. Daimu Halfani – advocate:

Your honour the matter is coming up today for judgment. We are ready to receive it.

Ms. Luciana Kikala State Attorney:

Your honour we are ready for Judgment.

Court: The judgment delivered on 4/6/2019 in presence of Mr. Daimu Halfani advocate for the petitioner and Ms. Luciana Kikala State Attorney for respondents.

A. A. Magutu
Deputy Registrar
4/6/2019

Right of appeal full explained.

I certify that this is a true and correct copy of the Original Order/Judgement/Ruling.

Deputy Registrar
High Court of Tanzania
Dated 4/6/19 ... Dsm

A. A. Magutu
Deputy Registrar
4/6/2019