14 August 2009

Case No. SADCT: 12/2008

SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL

UNITED PEOPLES' PARTY OF ZIMBABWE
v.
SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC), THE FORMER HONOURABLE PRESIDENT THABO MBEKI N. O., ZIMBABWE AFRICAN NATIONAL UNION – PATRIOTIC FRONT (ZANU-PF), MOVEMENT FOR DEMOCRATIC CHANGE – TSVANGIRAI FACTION, MOVEMENT FOR DEMOCRATIC CHANGE – MUTAMBARA FACTION AND THE REPUBLIC OF ZIMBABWE

JUDGMENT

BEFORE:	PRESIDENT: A. G. Pillay JUDGES: Dr. L. A. Mondlane; I. J. Mtambo; Dr. R. Kambovo; Dr. O. B. Tshosa
Citation:	UPP of Zimbabwe v. SADC, Judgment, Case No. SADCT: 12/2008 (SADC, Aug. 14, 2009)
Represented By:	APPLICANTS' AGENTS: Mr. Van Huysteen and Ms. W. L. Smallman RESPONDENT'S AGENTS: Dr. Uate; Mr. P. Machaya and Mr. Mutsonziwa

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JUDGMENT

DELIVERED BY H.E. DR. ONKEMETSE B. TSHOSA

[1] The Applicant has brought an application against the six Respondents in which it seeks an order in the following terms:

1) declaring the Memorandum of Understanding dated 21 July 2008 concluded between the Second, Third, Fourth and Fifth Respondents ("the MOU") to be in breach of, and contrary to, the mandate given by the First Respondent to the Second Respondent concerning the Republic of Zimbabwe dated 29 March 2007 and issued pursuant to the Extraordinary Summit of the First Respondent held at Dar-es-Salaam on 28 and 29 March 2007 ("the SADC Mandate");
2) setting aside the MOU;
3) declaring that any agreement, transfer of power, sharing of power or the appointment of any President or Executive Authority in relation to the Republic of Zimbabwe reached or to be

between the Second, Third, Fourth and Fifth Respondents, pursuant to the MOU concerning the future of Zimbabwe without the full involvement and participation of the Applicant, to be null and void;
4) ordering and directing the Second, Third, Fourth and Fifth Respondents to:
4.1. enter into negotiations with the Applicant with a view to concluding a Memorandum of Agreement that:
4.1.1. does comply with the SADC mandate; and
4.1.2. includes the Applicant;
4.2 negotiate with and include the Applicant with regard to any transfer of power, sharing of power or the appointment of any President or Executive authority for Zimbabwe, pursuant to such MOU.

5) Alternatively to prayers 1, 2, 3 and 4 above, directing the Second, Third, Fourth and Fifth Respondents to:
5.1. include the applicant as a party to the MOU;
5.2 negotiate with, and include, the Applicant with regard to any transfer of power; sharing of power or the appointment of any President or executive authority in Zimbabwe.

[2] In essence, the thrust of the Applicant's argument is that, as a political party in Zimbabwe, it should be included in, or be part of, any power-sharing agreement and process in Zimbabwe. The exclusion of the Applicant from the power-sharing process mandated by the first Respondent is, therefore, contrary to the SADC mandate embodied in the Communiqué issued on 29 March 2007.

[3] Of the six Respondents, only the first and sixth Respondents have opposed the application. The first Respondent argued that the application should be rejected because, first, the Applicant has failed to exhaust local remedies in Zimbabwe and, secondly, the Applicant did not qualify within the meaning of the First Respondent's Communiqué of the Extraordinary Summit of the Organ of August 2008 since the Applicant was unable to compete fully in the 29 March 2008 elections in Zimbabwe and was not successful in having any elected representative in the National Assembly or in the Senate.

[4] The sixth Respondent argued that the application should be rejected because the Tribunal lacks jurisdiction to entertain it. It contended that an analysis of the relief sought by the Applicant reveals that the Applicant's dispute is with the second, third, fourth and fifth Respondents and no relief is sought against it or the sixth Respondent. Additionally, the cause of action embodied in the application and the nature of the relief sought against the second, third, fourth and fifth Respondents is of a political nature which does not confer a legal interest upon the Applicant and, that being the case, the Tribunal cannot exercise jurisdiction over a purely political matter. Finally, according to the sixth Respondent, as no relief is sought against it, it was improper to make it a party to the application. Further, the power-sharing process being sought to be avoided by the filing of the application has already taken place in that the parties (the third, fourth and fifth Respondents) have already concluded the power-sharing agreement.

[5] The main issue which has to be decided by us is whether the Applicant was properly excluded from the power-sharing process. Before deciding this issue, there is a preliminary question that the Tribunal should determine. This question is whether the Tribunal has jurisdiction to entertain the application.

[6] In terms of Article 15(1) of the Protocol on Tribunal:

"The Tribunal shall have jurisdiction over disputes between Member States, and between natural or legal persons and Member States."

[7] Thus, according to Article 15 (1), the Tribunal can only entertain disputes between Member States and between natural or legal persons and Member States. The relevant part of Article 15 (1) for the purposes of the present application is the "disputes between … legal persons and Member States." It is not in dispute that the Applicant is a legal person in terms of the Laws of the Republic of Zimbabwe and has brought an application against the six respondents. The first, third, fourth and fifth Respondents are legal persons and the second Respondent is a natural person. This means that ordinarily the Tribunal would lack jurisdiction to entertain the matter between the Applicant and these Respondents because the parties would be private persons. The matter would then have to be entertained by the national courts of the sixth Respondent. However, since the application has also been brought against the sixth Respondent, which is a State, the Tribunal is invested with the necessary jurisdiction to hear the matter. We consider that, although no relief is sought against the sixth Respondent, the Applicant was right in making the sixth Respondent a party to the present proceedings as its interests are likely to be affected by the outcome of the present case.

[8] We now proceed to determine the main issue of whether or not the applicant was properly excluded from the power-sharing process. It should be observed that for some time before the National Elections, the sixth Respondent was beset with political disturbances. Despite these disturbances, the National Elections for Parliamentary, Senate and Local Government seats were held on 29 March 2008. All the political parties in the country participated in the elections, including the Applicant. The Applicant's candidates, however, did not win any seat in the National Assembly and the Senate. Moreover, it is to be noted that the Presidential Candidate for the Applicant, Dr. Daniel Kuzozvirava Shumba, did not contest the elections, following his exclusion by the election officers. Subsequently, in August 2008, the Supreme Court in Zimbabwe ruled that his exclusion was unlawful and went on to add that its decision was merely academic since the election process he was challenging could not be retrospectively reversed.

[9] At the Extraordinary Summit of the first Respondent held in Dar-es-Salaam, Tanzania, on 28 and 29 March 2007, the first Respondent had mandated the Second Respondent, the former President of South Africa, Thabo Mbeki, "to continue to facilitate dialogue between the opposition and the government and report back to the Troika on progress." Indeed, the second Respondent executed this mandate. We do not know what opposition parties the second Respondent had consulted, although the Applicant's Agent stated that the Applicant had not been consulted at all. There is no doubt in our minds that "opposition" in the Dar-es-Salaam Communiqué is to be given its ordinary dictionary meaning that includes the Applicant and if indeed the Applicant was not consulted by the second Respondent, the latter was wrong not to have done so. Having said that, however, it would appear that the mandate of the second Respondent changed after the elections of March 2008, as we shall see below. Indeed, in April 2008, at the end of an extraordinary meeting in Lusaka, the first Respondent issued a Communiqué that declared, inter alia:

"8. The Summit noted that the Report of the Chairperson of the Organ on the [29 March 2008] elections in Zimbabwe indicated that the electoral process was acceptable to all parties."
"11. The Summit congratulated and thanked the SADC Facilitator, President Thabo Mbeki and his Facilitation Team, for the role they had played in helping to contribute to the successful holding of elections. Summit requested President Mbeki to continue in his role as Facilitator on Zimbabwe on the outstanding issues."
"13. Member States, with the exception of Zimbabwe, held informal Consultations with Presidential candidates, Mr. Morgan Tsvangirai of the Movement for Democratic Change (MDC)

and independent candidate, Dr. Simba Makoni. Both opposition leaders confirmed that the elections were held in a free, fair and peaceful environment."

[10] Subsequently, on 21 July 2008 a Memorandum of Understanding (MOU) was entered into in Harare, Zimbabwe between the third Respondent i.e. Zimbabwe African National Union (Patriotic Front) and the fourth and fifth respondents i.e. the two Movements for Democratic Change. The MOU was brokered by the second Respondent, as the facilitator, Robert Mugabe (President, ZANU PF), Morgan Tsvangirai (President, MDC) and Arthur Mutambara (President, MDC). Thus, neither the Applicant nor any other political parties signed the MOU. The MOU defined the parties to mean Zimbabwe African National Union – Patriotic Front (ZANU PF), the two Movements for Democratic Change (MDC) led by Morgan Tsvangirai and Arthur Mutambara respectively. Again, neither the Applicant nor any other political parties were included as parties to the MOU. Moreover, the Global Political Agreement that led to the formation of the current unity government in Zimbabwe did not include the Applicant or its leadership. It is, therefore, clear that the Applicant was excluded from the power-sharing process.

[11] Mention must also be made in this regard of the first Respondent's Communiqué of the Extraordinary Summit of the Organ of August 17, 2008 which stated, inter alia, that:

"3. The Extraordinary Summit of the Organ considered the political developments in the Republic of Zimbabwe and:
(i) Recalled the Resolutions adopted in Dar es Salaam and in Sharm El Sheik on 30th June-1July 2008 on the framework of dealing with the Political Situation in Zimbabwe, which call upon the parties to form an all inclusive Government;
(ii) Acknowledged the efforts made by the parties so far in implementing the SADC and AU resolutions;
(iii) Commended the parties for their commitment to the dialogue in implementing the SADC and AU resolutions on resolving the Political Situation in Zimbabwe;
(iv) Commended the Facilitator, President Thabo Mbeki for his efforts and encouraged him to continue in his mediation efforts and fully support his work" (the underlining is ours).

[12] The question that arises is, therefore, whether there was any specific reason for excluding the Applicant from the power-sharing process. Or to put it differently, were there objective criteria on the basis of which the Applicant was or could be reasonably excluded from the power-sharing process? As rightly pointed out by the learned Agent of the first Respondent, "an all inclusive Government" referred to in the first respondent's Communiqué, mentioned above, could only consist of parties which had won seats in the March 2008 elections. It is a fact that only the third, fourth and fifth Respondents gained seats in the National Assembly and were consequently called upon to form an all inclusive Government by the second Respondent. Since the Applicant had no such representation in the National Assembly, it was, in our opinion, rightly excluded by the second Respondent.

[13] We also observe that the second Respondent's decision to exclude the Applicant and its leadership from the power-sharing process was based on political considerations. He used his discretion based on political considerations to include only the third, fourth and fifth Respondents in the power-sharing process since they all had representation in the National Assembly, as indicated already. In fact, the second Respondent was merely executing the new mandate given to him by the executive arm of the first Respondent, as is made clear by the latter's Communiqué, of August 2008, already quoted above, and the Tribunal cannot substitute his decision with its own.

[14] In the circumstances, the Tribunal holds that the Applicant was properly excluded from the power-sharing process and its application is hereby dismissed.

Delivered in open court this 14th day of August 2009, at Windhoek in the Republic of Namibia.

H. E. Justice Ariranga Govindasamy Pillay
PRESIDENT

H. E. Justice Isaac Jamu Mtambo, SC
MEMBER

H. E. Justice Dr. Luis Antonio Mondlane
MEMBER

H. E. Justice Dr. Rigoberto Kambovo
MEMBER

H. E. Dr. Onkemetse B. Tshosa
MEMBER