

**IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)
TRIBUNAL WINDHOEK, NAMIBIA**

CASE NO. SADC (T) 01/2009

IN THE MATTER BETWEEN

THE UNITED REPUBLIC OF TANZANIA

APPLICANT

AND

**CIMEXPAN (MAURITIUS) LTD
CIMEXPAN (ZANZIBAR) LTD
AJAYE JOGOO**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

CORAM

H.E. JUSTICE A. G. PILLAY

President

H.E. JUSTICE I. J. MTAMBO, SC

Member

H.E. JUSTICE DR. L. A. MONDLANE

Member

H.E. DR. R. KAMBOVO

Member

H.E. DR. O. B. TSHOSA

Member

M. Kamba

Applicant's Agent

A. Jogoo

Respondents' Agent

Hon. Justice M.C.C. Mkandawire

Registrar

D. Shivangulula

Court Clerk

RULING

Delivered by H. E. Justice Luis A. Mondlane

The present application (preliminary objection) is brought by the Respondent in the main case, the United Republic of Tanzania, hereinafter referred to as the Applicant against the Applicants, Cimexpan (Mauritius) LTD, Cimexpan (Zanzibar) LTD and Ajaye Jogoo, from now on referred to as the Respondents. The application is brought under Rules 33 and 67 of the Rules of Procedure of the Southern African Development Community (SADC) Tribunal (the Rules). According to Rule 33, an application shall state, *inter alia* particulars of the Applicant, the nature of the claim, together with a succinct statement of facts and the relief or order sought by the Applicant. It is essential to the matter at hand to refer to Rule 67 (1) which stipulates as follows:

“1. A party to the proceedings may apply to the Tribunal on a preliminary objection or preliminary plea not going to the substance of the case (...).”

It is clear from the abovementioned provision that once a preliminary objection is raised, the substance of the case may only be considered after the Tribunal has examined the application pertaining to the preliminary objection.

We now refer to the relief sought before the Tribunal in the main action by the Respondents. The Respondents instituted proceedings against the Applicant in order to have the deportation order made against the third Respondent rescinded.

As a result of a memorandum of understanding which the Government of Mauritius had entered into with the Government of Zanzibar, the third Respondent who is the Director of Cimexpan (Mauritius) LTD (the first Respondent), started investment operations in Zanzibar by signing a concession contract with the Government of Zanzibar through a joint venture, thus establishing a new company named Cimexpan (Zanzibar) LTD (the second Respondent). In a letter dated 21 September 2003, the Government of Zanzibar informed the first Respondent that the contract was terminated. Subsequently, the Applicant deported the third Respondent, who left behind his family and the assets of the second Respondent.

The third Respondent who represented the Respondents before the Tribunal alleged that when he returned to Zanzibar he was detained by immigration authorities and put in jail for one week where he was subject to ill treatment. He, however, conceded that he received the visit of a medical doctor on a daily basis. He was finally deported. The third Respondent further asserted that when the contract was cancelled, at 04:00 am, ten people came to his house with guns, knives, pangas and his family was beaten up.

The Applicant contended that the Tribunal has no jurisdiction over the matter since the Respondents had not exhausted local remedies and had no standing to institute proceedings before the Tribunal. The Applicant further argued that the application does not disclose international delinquency so as to render the Applicant liable under international law. The third argument was to the effect that the Tribunal could not grant the order sought because the application in the main case does not accord with Articles 14 and 15 of the Protocol on Tribunal (the Protocol).

We note that this Tribunal, as the SADC judicial institution, has the powers bestowed upon it by Article 16 of the Treaty of the Southern African Development Community (the SADC Treaty) and Articles 14 and 15 of the Protocol.

Article 16 of the SADC Treaty states that:

- “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 referred to it.*
- 2. The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit (...).”*

Article 14 of the Protocol stipulates that:

“The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to: a) the interpretation and application of the Treaty; (...).”

Article 15 of the Protocol provides as follows:

- “1. The Tribunal shall have jurisdiction over disputes between Member States, and between natural and legal persons and Member State.*
- 2. No natural or legal person shall bring an action against a Member State unless he or she has exhausted all available remedies or is unable to proceed under domestic jurisdiction”.*

The Tribunal is satisfied that the application is between legal persons and a natural person, on one hand, and a Member State of SADC, on the other. The question whether the Tribunal has jurisdiction must, therefore, be answered in the affirmative.

The Tribunal must also be satisfied that the Respondents, being legal and natural persons, had exhausted all available remedies within the domestic jurisdiction. The principle of exhaustion of local remedies is not unique to the Protocol. It is a common feature of regional and international conventions. According to the principle, individuals are required to exhaust local remedies in the municipal law of the State before they can bring a case to a regional or international judicial body. This means that individuals should first go through the court system (from the court of first instance to the highest court of appeal) before they can bring the matter to this Tribunal (See Case SADC (T) No. 2/2007, **Mike Campbell (PVT) Ltd. and others versus the Republic of Zimbabwe**). Exhaustion of local remedies is, therefore, a pre-requisite for persons to institute proceedings before this Tribunal against a Member State.

The Applicant further argued that there are effective and efficient remedies under section 14(6) of the Immigration Act No. 7 of 1995 (the Act) which provides as follows:

“A deportation order shall remain in force the period specified therein, unless sooner varied or revoked by the Minister, or, if no period is so specified, until varied or revoked by the Minister.”

Learned Counsel for the Applicant contended, in this regard, that any deportation order made by the Minister of Immigration under section 14(6) of the Act may be subject to a judicial review in the court system of the Applicant.

The Respondents aver that they had exhausted all available remedies but did not adduce any evidence in support of their averments. Further, it was stated on their behalf that since the deportation of the third Respondent, they could not seek any remedy within the territory of the Applicant. We consider, however, that the

Respondents did not explore all legal avenues for contesting the deportation order made by the Tanzanian Minister of Immigration. Deportation alone, in our view, does not amount to denial of access to the courts within the Applicant's territory. The third Respondent could, in our opinion, have hired the services of legal advisers in the territory of the Applicant, without being physically present therein, in order to challenge by judicial review the deportation order made against him, if he had so wished. We hold, therefore, that the Respondents had not exhausted local remedies and do not have *locus standi* to institute proceedings before the Tribunal.

We turn now to the second preliminary objection raised by the Applicant, namely, that the deportation order made against the third Respondent should be rescinded. The Applicant asserted that the thrust of its objection is that issues pertaining to admission and expulsion of aliens and expulsion rested, within its powers. It was further submitted on its behalf that it is an established principle of international law that a state has a right to admit an alien and also has the power to expel any alien from its territory on account of a breach of applicable laws within its territory.

John Dugart SC in his book "**Territory and International law: A South African Perspective**", 3rd edition, (2005), states as follows at pages 295 and 296:

"An individual has no right of entry to a state of which (...) is not a national. If (...) admitted, (...) may be expelled; but mistreatment is not permitted in the process of expulsion. . . According to article 13 of the International Covenant on Civil and Political Rights a person facing expulsion is entitled to submit reasons against (...) expulsion and to have (...) case reviewed by a competent authority "except where compelling reasons of national security otherwise require."

Moreover, the United Nations General Assembly Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in which They Live, Resolution 40/144, (1985); read together with the Universal Declaration of Human Rights, and other international instruments, constitute the minimum standard for the treatment of aliens. According to John Dugard, at page 298 -

“these principles include non-discrimination on grounds of race, the prohibition of torture and of inhuman or degrading treatment or punishment, and the right to a fair trial.”

The Respondents also claim that during the process of the third Respondent’s deportation he was subject to torture. Article 1 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) provides a definition of torture in the following terms:

“For the purpose of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

The Respondents did not adduce, however, any evidence to substantiate the allegations of torture or ill treatment that may constitute an offence under international law. The Tribunal is, therefore, not in a position to determine whether the third Respondent has been subjected to torture or other cruel, inhuman or degrading treatment.

We consider that the right to admit or to expel an alien remains squarely within the preserve of the sovereignty of the Applicant, subject to the observance of minimum human rights standards, for the treatment of aliens. The American Commission (*vide* Malcolm N. Shaw QC in **International Law**, fifth edition); 2003, stated at page 734, in the **Neer** case (4RIAA, pp. 60, 61-2; 1926; 3AD, p. 227) that:

“the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man recognise its insufficiency”.

Having reviewed all the circumstances of the present application, we consider that the third Respondent did not substantiate his allegations of torture or ill treatment and that the Applicant’s deportation of the third Respondent in the particular circumstances of the case did not constitute an international delinquency.

We, therefore, hold as follows:

- a) the Respondents have not exhausted local remedies and, the Tribunal has consequently no jurisdiction over the matter; and
- b) the Respondents have not substantiated their allegations of torture or ill treatment so as to render the deportation order made against the third Respondent an international delinquency.

We make no order as to costs.

**Delivered in open court this 11th day of June 2010, at Windhoek,
in the Republic of Namibia.**

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H.E Justice Ariranga Govindasamy Pillay
PRESIDENT

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H.E Justice Isaac Jamu Mtambo, SC
MEMBER

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H.E Justice Dr Luis Antonio Mondlane
MEMBER

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H.E Justice Dr Rigoberto Kambovo
MEMBER

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H.E Justice Dr Onkemetse B. Tshosa
MEMBER