13 June, 2011

To:

H.E. The Executive Secretary,

Dr. Topaz Augusto Salamao,

SADC Secretariat.

Your Excellency,

Please find herewith our Opinion concerning the decisions taken by the Council of Ministers, and endorsed by the Extraordinary Summit of Heads of State and Government, of the Southern African Development Community. We are seeking compensation, for the reasons given therein, for not having been re-appointed for a period of five years as from 31 August 2010. In case of disagreement about whether compensation is due and payable and/or the amount payable, we request, in the interests of justice, that the matter be referred to arbitration.

Yours Sincerely,

Justice Ariranga G. Pillay,
Former President and member of the SADC Tribunal

Justice Rigoberto Kambovo,
Former member of the SADC Tribunal

Justice Onkemetse B. Tshosa,
Former member of the SADC Tribunal

Justice Frederick Chomba,
Former member of the SADC Tribunal

THREE ILLEGAL AND ARBITRARY DECISIONS TAKEN IN BAD FAITH BY THE SADC COUNCIL OF MINISTERS AND SUMMIT OF HEADS OF STATE AND GOVERNMENT

The Council of Ministers (Council) of the Southern African Development Community (SADC) at its meeting of 19 May 2011 took in effect the following decisions which were subsequently endorsed by the Summit of Heads of State and Government (Summit) at its extraordinary meeting of 20 May 2011, in Windhoek, Namibia:

(1) the non-reappointment of members of the SADC Tribunal (Tribunal) whose term of office expired on August 31, 2010;
(2) the non-replacement of members of the Tribunal whose term of office will expire on October 31, 2011;
(3) the dissolution of the Tribunal in its present form which is expressly barred from hearing any new or pending cases; and
(4) the establishment of a new Tribunal with a different jurisdiction and a new membership after the Ministers of Justice/Attorneys General have amended the relevant SADC legal instruments e.g. the SADC Treaty and the Protocol on Tribunal (Protocol) and submitted a progress report to Summit in August 2011 and the final report to Summit in August 2012.

No doubt, weasel words, like "*reiterate*" and "*moratorium*", were used in paragraph 8 of the communiqué of Summit but a close reading of both paragraphs 7 and 8 shows beyond doubt that the present Tribunal has in reality not only been suspended but also dissolved altogether. It is to be replaced by a new Tribunal after August 2012, with a new jurisdiction and a new membership. The present Tribunal is, therefore, defunct. Moreover, it is to be noted that Summit in August 2010 did not prohibit the hearing of pending cases by the Tribunal whereas now there is an absolute prohibition of "*hearings of any cases by the Tribunal*" until the Protocol has been reviewed and approved by Summit. The use of the word "*reiterate*" is, therefore, misleading to say the least!

The decision of Summit at (3) above is clearly illegal and ultra vires. Summit has no power to restrict the jurisdiction of the Tribunal, not least because it is itself subject to the Tribunal's jurisdiction. By the same token, Summit cannot overrule the provisions of Article 8(4) of the Protocol which state as follows:

"*Notwithstanding the expiration of his or her term of office, a Member shall continue to hear and complete those cases partly heard by him or her*".

Summit does have, of course, the power to amend the SADC Treaty and the Protocol but the proper procedures have not yet been followed. They will no doubt be followed later, pursuant to the decision of Summit at (4) above.

The decisions of Summit at (1) and (2) above are also illegal and ultra vires in that they have been taken to make sure that the Tribunal is completely paralysed in its core

activities, namely the hearing of any new or pending case until well after August 2012. It is significant that, even if the hearing of new or pending cases were not prohibited, the Tribunal would still be paralysed since the Tribunal must at least be constituted by three members to hear any case- vide Article 3(3) of the Protocol. The fundamental principle of access to justice is violated in this regard- vide, for instance, Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008).

We consider that these three decisions of Council endorsed by Summit are not only extraordinary in the circumstances but are also illegal and ultra vires and in contravention of Article 4(c) of the SADC Treaty i.e. the principles of "human rights, democracy and the rule of law". They have also been made in bad faith, as will be amply demonstrated below.

After all, what is the point of commissioning an independent review, as SADC did, having extensive consultations with all relevant stakeholders, including Tribunal members, both before and after its findings are published; having its preliminary recommendations discussed at a workshop of Senior Legal Officials in Swakopmund, Namibia, which was also attended by members of the Tribunal who took an active part in the proceedings, amended and finally translated into final recommendations; having those recommendations thoroughly examined anew in lengthy discussions with both Senior Legal Officers and members of the Tribunal, amended anew and unanimously approved by Senior Law Officials at their meeting held in April in Swakopmund, Namibia which preceded that of Ministers of Justice/Attorneys General, before the review itself is questioned anew in its fundamental elements by the Ministers of Justice/Attorneys General who are now mandated by Summit to conduct their own partisan review?

If the Tribunal was legally constituted and did not lack jurisdiction, and its decisions are binding on all SADC Member States, as the Ministers of Justice/Attorneys General acknowledged, why did the latter reopen anew the debate and express serious concern about the scope of jurisdiction of, and the law applied by, the Tribunal instead of deciding about the appropriate action to take against Zimbabwe for non-compliance with the judgments of the Tribunal in 2008 and 2010 respectively, an important issue which has always been ducked and postponed since 2009 for reasons best known to themselves and has not yet been decided- vide Campbell and Another v Republic of Zimbabwe (SADC (T) 03/2009) [2009] SADCT 1 (5 June 2009) and Fick and Another v Republic of Zimbabwe (SADC (T) 01/2010) [2010] SADCT 8 (16 July 2010).

Surely, if the Ministers of Justice/Attorneys General had serious reservations about those two issues mentioned above, what was the point of the exercise in the first place i.e. the review of the independent consultant, chosen by the Ministers of Justice/Attorneys General themselves, relating to the role, responsibilities and terms of reference of the Tribunal ,the organisation of the workshop and the meetings of Senior Law Officials and Ministers of Justice/Attorneys General held in Swakopmund, Namibia, which, indeed, all required a mobilisation of scarce resources, energy and money?

Moreover, if the Ministers of Justice/Attorneys General know better, as recently decided by Summit, why did they not carry out their own review in 2010? Is it because at that time they did not appreciate the full implications relating to the scope of jurisdiction of, and the law

applied by, the Tribunal but after the final report of the independent consultant was published, the scales suddenly fell from their eyes?

It is also a fact that all the members of the Tribunal were appointed in August 2005 and that no lot was drawn, pursuant to Article 6(1) of the Protocol. The lot was only drawn in October 2008 after an amendment was made to paragraph (2) of Article 6 which reads as follows:

"*In the event that the draw of the lot is not done pursuant to paragraph 1, for members of the Tribunal whose term of office is to expire at the end of three years, their term of office shall be deemed to be extended for a period that would have elapsed between the date of first appointment and the date of making the draw*" (emphasis added).

It would appear that, after the phrase *"at the end of three years"* in Article 6(2) of the Protocol, we should read into the text "*after the drawing of a new lot*". That is indeed the interpretation of the SADC Secretariat. Consequently, two regular members of the Tribunal whose term of office runs only for three years, as a result of the drawing of the lot, have benefited from the provisions of Article 6(2) and have had their term of office extended until 30 October 2011. Hence, Article 6(2) deals only with members whose term of office expires after three years but does not apply to those whose term would expire in five years.

Thus, three regular members and one non-regular member of the Tribunal whose term of office expires in five years leave office on 31 August 2010. The pertinent question that arises is why those two regular members whose term of office expires in three years should have an unfair advantage in having their term extended until 31 October 2011 whereas those four members whose term of office comes to an end in five years should leave office on 31 August 2010? The answer lies in the fact that these three regular members and one non-regular member may be reappointed for a further and final term of five years-see Article 6 (1) of the Protocol.

Article 7(1) of the Protocol also provides that the Tribunal shall elect the President for a term of three years. The former President, Justice Pillay, was appointed on 27 November 2008 so that his term of office would normally run out on 27 November 2011.

Before the Council meeting in August 2010 held in Windhoek, Namibia, there was a specific item put on the agenda by the Executive Secretary of the SADC Secretariat (Executive Secretary) to the effect that the three regular members of the Tribunal and the one non-regular member, who were specifically mentioned by their names, namely Justices Pillay, Kambovo and Tshosa and Justice Chomba respectively should be reappointed, presumably since their term of office was going to run out at the end of the month of August. Council made no decision on the matter, arguing that this particular item should first have been discussed and approved by the Ministers of Justice/Attorneys General, which it was not.

The same item was nevertheless put on the agenda of the meeting of Summit by the Executive Secretary and Summit decided, in essence, that, pending the review of an independent consultant relating to the role, responsibilities and terms of reference of the Tribunal, the issue of the reappointment of members whose term of office would expire on

31 August 2011 would be deferred and that, in the interval, those four members should remain in office and could hear pending cases but not new ones.

The four of us thus remained in office as President and members of the Tribunal respectively, in spite of the expiry of our term of office and had the legitimate and reasonable expectation that, at the end of the review, our term of office would be renewed. Furthermore, it should be stressed that since August 2010, the Tribunal, however, was unable to hear any of the pending cases as it was starved of funds and the Tribunal's requests for extra funding to the SADC Secretariat fell on deaf ears.

The review of the independent consultant took place and his final report was examined first by the Senior Legal Officials in April 2011. One of their recommendations to the Ministers of Justice/Attorneys General was to the effect that the latter should recommend to Summit that the reappointment and replacement of the Members of the Tribunal be finalised in accordance with the Protocol. The Ministers of Justice/Attorneys General endorsed that recommendation but added that such reappointment and replacement should be finalised, "having due regard to their recommendation...to review and amend the relevant SADC legal instruments (e.g. the Treaty and the Protocol on the Tribunal)". We consequently really thought at that time that we were cruising to our reappointment as members of the Tribunal, in the light of no indication to the contrary.

Then came a bolt out of the blue, namely the extraordinary decision of Council endorsed by Summit, indicated already at (1) above, not to reappoint the members of the Tribunal whose term of office expired on 31 August 2010, nor to allow them to remain in office, pending the review of the Ministers of Justice/Attorneys General in 2012. No reason was given for this decision which was taken behind the back of those members.

The first issue that arises from this decision is that the two members of the Tribunal whose term of office expires in three years continue to have an unfair advantage in that they remain in office until 31 October 2011 and get all their allowances and gratuity during that period whereas we, the three regular members and one non-regular member whose term of office has expired on 31 August 2010 but who have been allowed to stay in office, pending the review which is now over and who have had a legitimate and reasonable expectation that our term of office would be renewed, in the light of all the circumstances related above, were only informed by a communiqué of the Summit that we would not be reappointed, without any reason being given and without having been given a hearing. Crucially, until now we have not received any official communication from the Executive Secretary in this regard.

Moreover, since Justice Pillay was not reappointed for a term of five years, his membership came to an abrupt end as did that of the three other members and he ceased forthwith to be also the President of the Tribunal, although his term of office as President runs until 27 November 2011. He consequently suffered a double prejudice. All four of us consider that the decision of Council endorsed by Summit not to reappoint members of the Tribunal is not only in the circumstances arbitrary but is also illegal under Article 4(c) of the SADC Treaty, as indicated already.

In addition, all four of us have had throughout a legitimate and reasonable expectation, in the circumstances described above, that we would be reappointed and that one of us, namely, Justice Pillay, would consequently remain President of the Tribunal until 27 November 2011.

We note also that members of the Tribunal are normally reappointed by Summit under Article 6(1) of the Protocol unless there are strong reasons to the contrary. This interpretation has not only been expressly accepted by the independent consultant in his final report but also specifically approved by the Senior Law Officials in their deliberations at their meeting held in April 2011 in Swakopmund and by the Executive Secretary who put the item of the reappointment of Tribunal members again on the agenda of Senior Legal Officials and Ministers of Justice/Attorneys General at their respective meetings in April 2011 and subsequently of Council and Summit at their meetings in May 2011, just like he had done on two previous occasions in August 2010.

It is noteworthy that no reason whatsoever has been advanced for our non-reappointment nor were we informed of any! On the contrary, as mentioned already, there was a specific recommendation that we should be reappointed but we were not. Instead we, members, who are independent judges and one of us who was also President and head of a SADC institution, who used not only to sit at the high table with Ministers of Justice/Attorneys General and Ministers forming part of Council at the opening of their meetings but also with Heads of State and Government at the opening and closing of Summit meetings and have had mostly mutually respectful relations with them, were shabbily treated and sent packing overnight, without any reason being given and without a hearing, like an employee who had been caught red-handed while committing a gross misconduct!

It is ironic that Council and Summit should do to us with impunity what they had done to Mr Kanyama and Mr Mondlane, high-level officials of the SADC Secretariat, namely not to renew their term of employment, without any valid reason being given, when they had a legitimate and reasonable expectation that their term of employment would be renewed. Mr Kanyama and Mondlane had, significantly, a right of redress to the Tribunal against the decisions of Council and Summit. The Tribunal decided in their favour and ordered the renewal of their contracts not only on the ground that they had a legitimate and reasonable expectation that their contracts would be renewed but also that Council and Summit took into account irrelevant and wrongful considerations in coming to their decisions and denied both of them the right to a hearing before their decisions were taken -vide Kanyama v SADC Secretariat (SADC (T) 05/2009) [2010] SADCT 1 (29 January 2010) and Mondlane v SADC Secretariat (SADC (T) 07/2009) [2010] SADCT 3 (5 February 2010).

We, for our part, have no such legal redress but we consider that, nevertheless, we are entitled, in the particular circumstances of the case and in the interests of justice, to compensation, both material and moral, for being unlawfully and arbitrarily denied reappointment as members of the Tribunal for a term of five years as from 31 August 2010 and that one of us, Justice Pillay, is also entitled to compensation for being unlawfully and arbitrarily deprived of the Presidency of the Tribunal since his term as President expires on 27 November 2011, as mentioned already.

One final observation. We never expected, in spite of the various alternatives proposed by the independent consultant in his final report, the Ministers of Justice/Attorneys General or the Council or Summit in 2011 to take, at long last, appropriate action against Zimbabwe for non-compliance with the judgments of the Tribunal of 2008 and 2010 for the simple reason that, every time the issue has been discussed, a stratagem has always been devised to defer consideration of the matter. But still, we did not expect or foresee this time the new drastic action taken on political grounds which at a stroke does away with the intractable problem of taking action against Zimbabwe: the complete dissolution of the Tribunal in its present form, with its current jurisdiction and membership, as rightly pointed out by the Minister of Foreign Affairs of Zimbabwe at the close of the Summit meeting.

So this extraordinary deed was done at the expense of the Tribunal and its judges who are both easily expendable, in breach of the principles of human rights, democracy and the rule of law, as a result of which no action needs to be taken against Zimbabwe! After all, what is the point of enforcing two judgments of a defunct Tribunal? So the argument goes. It is to be noted, however, that the two judgments have not become defunct although the Tribunal itself has, since it is now accepted by everyone, including the Ministers of Justice/Attorneys General, that the Tribunal was legally constituted and did not lack jurisdiction when it handed down those judgments.

Granted that Council and Summit believe that they are all powerful and are accountable to no natural or legal person and can take any action they deem fit against the Tribunal and its members but the fact of the matter remains that both of them are constrained in their actions by the provisions of the SADC Treaty and the Protocol, as mentioned already. Moreover, both of them are subject to the Tribunal's jurisdiction, as stated already. No doubt Council and Summit can amend the SADC Treaty by deleting, for instance, Article 4(c) relating to the justiciable and enforceable principles of human rights, democracy and rule or law, and the Protocol by curtailing the present jurisdiction of the Tribunal, as they have already decided but the point is that all this is for the future!

Consequently, the decisions taken by Council and Summit at (1) to (3) above are in breach of the SADC Treaty and the Protocol, as indicated already, and the prejudice suffered by the President and members of the Tribunal must be remedied, the more so as the manner of their non-reappointment amounted in the circumstances to a summary dismissal for gross misconduct in that the four Judges concerned who, together with others, had nursed the Tribunal from its infancy in August 2005 to adulthood, and are not posted in Namibia, the seat of the Tribunal, were denied a hearing or even the opportunity of collecting their personal belongings which they had left behind at the Tribunal and bidding adieu to the staff of the Tribunal, their friends and well-wishers.

Moreover, these three decisions of Council and Summit send the worst possible signal not only to the SADC region but also to potential investors, donors and the international community at large that the highest authorities of SADC at best only pay lip service to the principles of human rights, democracy and the rule of law and do not scrupulously adhere to them.

At this stage the following questions may be asked: did Council and Summit really think through their decisions before taking them? Did they seek any advice, legal or otherwise, including from the Executive Secretary and the Head of the Legal Affairs Unit of the SADC Secretariat before reaching their decisions? What was the advice proffered and by whom? Was the advice proffered ignored? All these questions remain unanswered and significantly point not only to a lack of transparency in relation to these three important and far-reaching decisions taken by Council and Summit but also to a lack of good governance on their part.

It is understandable that Council and Summit, in their desire to replace the Tribunal with a new one with a different jurisdiction, should also want a new membership for the Tribunal. It was open to both Council and Summit, through the Executive Secretary, to find a diplomatic and amicable solution to the problem regarding the present membership of the four justices, whose term of office was due to be renewed since 31 August 2010, instead of acting, as they had done, in such a high-handed and imperious manner worthy of potentates!

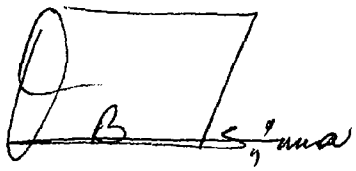
We consider, therefore, that Council and Summit should face up to the consequences of their action in the circumstances and pay fair and adequate compensation for the prejudice, both material and moral, caused to the President and members of the Tribunal whose term of office was not renewed. In case of disagreement about whether compensation is due and payable and/or the amount payable, we request, in the interests of justice, that the matter be referred to arbitration.

Justice Ariranga G. Pillay,

Former President and member of the SADC Tribunal

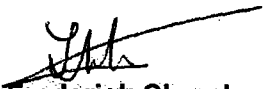
Justice Rigoberto Kambovo,

Former member of the SADC Tribunal



Justice Onkemetse B. Tshosa,

Former member of the SADC Tribunal



Justice Frederick Chomba,

Former member of the SADC Tribunal