SADC Tribunal pending the conclusion of the new Review of the Ministers of Justice/Attorneys General.

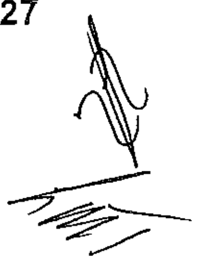
The first point to note is that this decision leads to an anomalous situation in that, on the one hand, the two members of the Tribunal whose term of office normally expires in three years continue to have an unfair advantage in that they remain in office until 31 October 2011 and get all their allowances and gratuity during that period.

On the other hand, 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 Summit, sent to us by the Registrar of the Tribunal on 22 May, that we would not be reappointed, without any reason being given and without having been given a hearing.

I did not receive any official communication from the Executive Secretary until 21 June. It is to be noted that I only received the official communication after we had sent a memorandum to the Executive Secretary on 14 June complaining about the decisions taken by Council and Summit against us.

Moreover, since I was not reappointed for a term of five years, my membership came to an abrupt end as did that of my three other colleagues and I ceased forthwith to be also the President of the Tribunal, although my term of office as President runs until 27 November 2011. 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.

Moreover, all four of us, members of the Tribunal, have had throughout a legitimate and reasonable expectation, in the circumstances described above, that we would be re-appointed and that I would consequently remain President of the Tribunal until 27 November 2011.



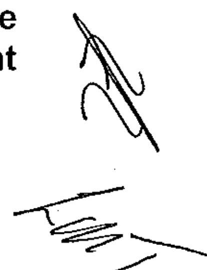
We note also that members of the Tribunal are normally re-appointed by Summit under Article 6(1) of the Protocol, all other things being equal i.e. unless there are strong reasons to the contrary. This interpretation has not only been accepted by the independent consultant in his final report but also 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 .

Moreover, the Workshop had specifically recommended that "*members of the Tribunal with renewable terms should be automatically reappointed unless they cease to comply with qualification requirements*".

It is noteworthy that no reason whatsoever has been advanced for our non-reappointment nor we were 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 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 employees who had been caught red-handed while committing a gross misconduct!

The pertinent question that arises is whether the President or Minister of a SADC Member State would have dared to treat the Head of the judiciary and its senior judges in his own country in the same manner that Council and Summit have done in relation to the President and judges of the Tribunal! Why is it that the President



and members of the Tribunal were singled out for this unusually harsh treatment?

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 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, however, 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 and Mondlane, already quoted.

We, for our part, have no such legal redress which is both effective in practice as well as in law – Mike Campbell (Pvt) Ltd, already cited, and Gondo and others v The Republic of Zimbabwe (SADC (T) 05/2008.

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.

Indeed Summit decided again to defer the taking of action against Zimbabwe's non-compliance with the Tribunal's findings until the concerns expressed by the Ministers of Justice/Attorneys General "*on a number of issues on the legal framework within which*" the Tribunal operates "*are translated into revisions and amendments made*" to the SADC Treaty, the Protocol and the Rules of Procedure of the Tribunal which are an integral part of the Protocol. It is not clear, however, why action against Zimbabwe should have been again deferred unless the revisions and amendments are expected

to provide ultimately a retrospective justification for not obliging Zimbabwe to comply with the Tribunal's rulings.

It is interesting to note in this connection what the Independent Consultant and the Workshop had recommended in respect of enforcement of Tribunal decisions: All SADC countries should confer to those decisions the force of law and empower their judicial organs to implement them as domestic law and not as foreign law and the Tribunal should be empowered to impose remedies for non-compliance with its judgements and other decisions.

Moreover great reliance has been placed by some Ministers and Heads of State and Government on Article 10 (9) of the SADC Treaty where it is stated that "*decisions of Summit shall be taken by consensus*" to justify their acquiescence in the three decisions taken by Summit. Both the independent Consultant and the Workshop have explained that, in the application of the principle of consensus, State practice has constantly shown that a member state with a direct interest in a matter should not take part in the process. Indeed it is a common principle of all international organizations that parties with a conflict of interest are precluded from voting on matters involving that conflict of interest.

But still we did not expect or foresee this time the new drastic action taken: the demise or 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.

Granted that Council and Summit believe they are all powerful and are accountable to no natural or legal person and can take any action they deem fit against both the Tribunal and its members that are expendable but the truth remains that both Council and Summit are constrained in their actions by the provisions of the SADC treaty and the Protocol, as mentioned already.

Moreover, both Council and Summit are subject to the Tribunal's jurisdiction, as mentioned already. No doubt Council and Summit

can amend the SADC Treaty and the Protocol by curtailing the jurisdiction of the Tribunal but the point is that it is all 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 we suffered as President and members of the Tribunal must be remedied, the more so as the manner of our 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.

We, members of the Tribunal, are proud of the Tribunal's achievements which include not only its body of SADC jurisprudence, the adoption of a Strategic Plan, the conclusion of a memorandum of understanding with the East African Court of Justice, the organisation of various training courses on, including international trade and labour matters for the members and staff of the Tribunal and the establishment of a SADC Law Journal with the financial assistance of the Konrad Adenauer Foundation. Indeed the Workshop recommended that SADC Member States, civil society and international concerned partners should support the current efforts made by the Tribunal, such as the Strategic Plan.

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.

It is significant that some fifty per cent of the funds of SADC come from traditional donor countries i.e. international cooperating partners (ICPs), such as the European Union, US Aid, Department of International Development (UK) and the Nordic Countries.

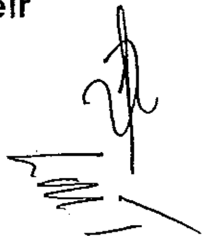
At this stage the following questions may be asked: did Council and Summit really think through their decisions before taking them? Did they seek any advice, legal or otherwise, including from the Executive Secretary and the Head of the Legal Affairs Unit of the SADC Secretariat before reaching their 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 an ostensible 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 or kings who can do no wrong and who are not accountable for their actions. The Tribunal has on several occasions in the past castigated this kind of illegal behaviour which is all too prevalent and is in breach of the principle of the rule of law- vide Kanyama, Mondlane, Bookie Monica Kethusegile-Juru and Gondo, already quoted.

We consider, therefore, that Council and Summit should face up to the consequences of their acts and do the decent and honourable thing 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 mediation or arbitration.

5. CONCLUSIONS

We must not give up hope but must fight on and intensify our efforts to ensure that the Ministers of Justice/Attorneys General in their review process DO NOT:



(1) repeal the principles of human rights, democracy and rule of law, which are justiciable and enforceable: and
(2) deny access to the Tribunal to individuals who want to bring cases against their States on those grounds. It should be noted that 80 per cent of applications before the Tribunal concern cases of individuals against States. Moreover, people are at the centre of human rights and human rights treaties are ratified by States to benefit people.

As recommended by the Workshop, the principles of human rights and the rule of law should be respected by all SADC organs and SADC Member States.

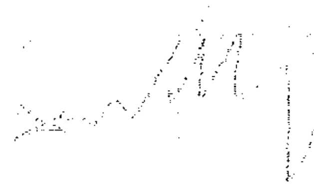
The Ministers of Justice/Attorneys General may set up, as recommended by the independent consultant, an appellate division of the Tribunal provided it consists of competent and independent judges. They may also refer to this appellate division the judgments of Mike Campbell (Pvt) Ltd, Gondo and others, if they really so decide, although so many years have elapsed since the decisions were handed down! However, if any of the judgments is upheld on appeal, as was the case in the appellate division of the East African Court of Justice when it was created, it should forthwith be implemented by the state party concerned. Otherwise, Summit must take the appropriate action.

In the interests of justice, the unanimity rule should not allow any SADC Member State to be judge and party in any matter involving a conflict of interest. As specifically observed by the independent consultant:

"*Article 10(9) of the SADC Treaty should be understood to contain an implied* condition *that* the *Member State in question shall not take part in a vote on 'action' or 'sanctions'*."

Finally, the Ministers of Justice/Attorneys General should, pursuant to Article 23(1) of the SADC Treaty, seek to engage fully with the people of the SADC Region and key stakeholders such as civil society, non-governmental organizations, the private sector, etc. in conducting the review process, in pursuance of the objectives of the SADC Treaty.

These are my conclusions and resolutions. I do hope they become yours, too, and will be taken into account by SADC leaders. Ladies and Gentlemen, I thank you for your attention.



Ariranga G. Pillay,

Former President of SADC Tribunal

304

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IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NO. 47954/2010
72184/2010
77881/2009

In the matter between:

GOVERNMENT OF THE REPUBLIC OF ZIMBABWE — Applicant

and

LOUIS KAREL FICK — First Respondent

RICHARD THOMAS ETHEREDGE — Second Respondent

WILLIAM MICHAEL CAMPBELL — Third Respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — Fourth Respondent

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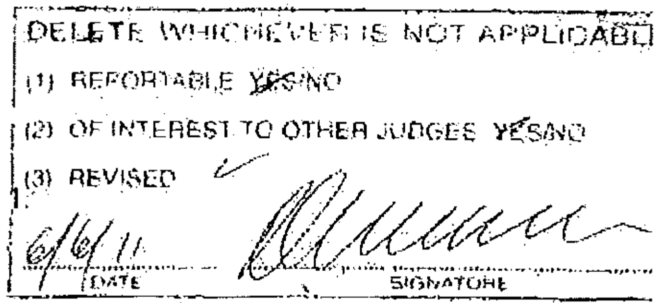
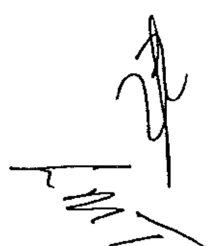
JUDGMENT

Delivered on ____________________

R D CLAASSEN J


DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED ✓
6/6/11 — DATE
SIGNATURE

By order of this Court three cases involving the same parties, and emanating from the same issues between them, were consolidated and are now being heard together



2.

BACKGROUND:

In 2007 seventy odd white commercial farmers in the Republic of Zimbabwe, including the present Respondents, approached the South African Development Community ("*SADC*") Tribunal ("Tribunal") for a ruling that the dispossession of their farms by the Applicant, without compensation, is unlawful, and asking the Tribunal to order the Applicant to protect their rights. The order was granted. The Applicant refused to adhere to the orders and the Respondents brought two applications to the Tribunal asking it to find the Applicant in contempt of Court. Again these applications succeeded The Tribunal thereafter made a ruling that the taxed costs of the two contempt applications were reasonable and made an order in favour of the Respondents against the Applicant for those costs (R112 780.13 and USD5,816.47, respectively) (The Third Respondent died a day or two before the hearing as a result of the assaults sustained during his eviction from his farm. No substitution of an executor was sought because the other Respondents still had *locus standi* to continue with the hearing and the Applicant did not object thereto).

3.

Respondents then wanted to make those costs orders enforceable as against the Applicant here in the RSA. It was obvious that Applicant was not going to pay because it denied the Tribunal's jurisdiction over it, in any way or form. The Respondents then first applied for an order of edictal citation allowing them to serve the notice of motion for the registration of the orders in South Africa, via their attorney, on the Applicant in Harare, at:

3.1 The offices of the Attorney General in Harare Zimbabwe;

3.2 The administrative head office of the Applicant's Minister of Justice in Harare

After full argument *inter alia* on the question of jurisdiction of this Court in the matter, Tuchten AJ (as he then was) gave the order. It was subsequently so served on Applicant, and the matter was set down for hearing on the 25th February 2010, before Rabie J.

4

Applicant, subsequent to the service of the edictal citation order, entered an appearance to defend, but withdrew it afterwards. Again, the issue of jurisdiction was fully canvassed in the argument before Court (heads of argument were filed by Mr Gauntlett SC, who also now appears for the Respondents together with a junior, Mr Pelser.) It must be noted that when the notice of intention to defend was withdrawn, no reasons were given.

Rabie J then granted the application on the 25th February 2010 on an unopposed basis. The Applicant has now applied in the three applications before Court for the following relief:

4.1 Case Number 77881/09:

Suspending a writ, pursuant to Rabie J's judgment) issued against the properties of the Applicants on the 26th March 2010, (by the Registrar). It does so on two grounds:

4.1.1 That the writ was not actually served on applicant;

4.1.2 The applicant's property is subject to international immunity.

4.1.3 Alternatively it prays that the writ be suspended pending the finalisation of the SADC process on whether the Protocol on the Tribunal is in force and binding on the Applicant. It is common cause that the writ issued by the present Respondents has not yet been served on the Applicant but has been executed, to the extent that the Sheriff of Wynberg (Western Cape) has attached the properties in terms of the writ. The Applicant further applies that the properties listed in the writ be declared to be protected in terms of Applicant's immunity in terms of the Foreign States Immunity Act 87/81 ("*The FSIA*") (as amended) and that the

writ only extends to properties not protected under the *"International Doctrine of State Immunity and which are executable"*. In this regard it is to be noted that the South Gauteng High Court (per Lamont J) has already found that at least one property is not immune in that it is used as a commercial property (being rented out) and therefore not protected by the FSIA (Section 14(3)).

4.2 Case Number 47945/10:

This is an application to rescind Rabie J's order of registering the costs orders of the Tribunal in South Africa, in terms of which the writ was issued.

4.3 Case Number 72184/10:

This is an application to rescind the order of Tuchten AJ for edictal citation.

5.

For ease of reference I shall deal with the cases in chronological sequence.

6.

CASE NO 72184/10; EDICTAL CITATION; (Tuchten AJ's Judgment)

In the founding papers of this application the Applicant states that:

6.1 It was not legally competent for this Court to grant substituted service by way of edictal citation to have the Tribunal's orders registered here;

6.2 At the time of hearing the application for edictal citation the Court was not apprised of the provisions of the FSIA where procedures are laid down for service of process on foreign states (i.e. via their respective Ministries of Justice), and giving a two-month period to file an intention to defend. The FSIA also provides that the Court must *mero moto* take cognisance of a foreign state's immunity, even without it appearing at the hearing.

7.

In argument before Court reference was also made to Section 27 of the Supreme Court Act 59/69, which prescribes a 21-day period to file an intention to defend where service is affected outside the jurisdiction of the Court.

8.

In essence applicant contends that :

8.1 The court has no jurisdiction over it;

8.2 Respondents used the wrong procedure;

8.3 The order could not be given legal effect to.

9.

It is so that Respondents did not follow the procedure prescribed in the FSIA, nor did it give the Applicant at least a 21 days or the 2 months period to file an intention to defend. Edictal citation is however an interlocutory order. No substantive rights follow from it for any party. It is true that a court in an *ex parte* application must be fully appraised of all the relevant facts and law. It is not disputed that Tuchten AJ did hear full argument on the question of jurisdiction. The order however does not *per se* grant the court hearing the matter any more jurisdiction or any other power that it did not have in any event. In other words the applicant retained all its rights. The merits thus have to be addressed at the final hearing.

10.

10.1 A further point to be considered is sec 13(7) of the FSIA. It provides that the provisions, relating to a manner of service, prescribed in the other subsections of Section 13 "*shall not be construed as affecting any rules whereby leave is required for service of process outside the jurisdiction of the Court.*" From this it is obvious that edictal citation is the proper way of serving a process. Applicant's argument that the High Court Rules relating to edictal citation, only relates to natural persons in corporate entities, and not to foreign states, is simply not correct;

10.2 The only point that may have been relevant is the applicant was not granted the 2 month period granted by the FSIA, nor the 21 days granted by the Supreme Court Act. to file an intention to defend. The fact is that applicant did file such a notice within a few days. The fact that it withdrew it subsequently is of no import on this issue.

10 3 There is thus no merit in the application, and even if there was, it would have had no effect on the matter whatsoever.

11.

In view of the abovementioned findings, the application is to be dismissed with costs, including costs of two counsel

12

CASE NUMBER 47954/10: JUDGMENT OF RABIE J,:

The Applicant's main contention in this case, which also affects the other two cases, is that the Protocol was not ratified in Zimbabwe. The Treaty itself, and Zimbabwe's own constitution, requires foreign treaties to be registered by its own Parliament. This, it says, was not done. Therefore it is argued that the Tribunal had no jurisdiction over it and consequently those orders cannot be registered in South Africa.

13

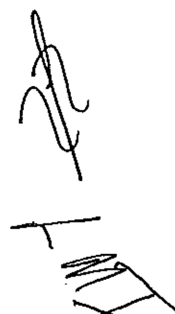
The second point is that the whole Treaty and Protocol. has been referred to the Summit Meeting of SADC to review aspects of the Protocol relating to the

The second point is that the whole Treaty and Protocol. have been referred to the Summit Meeting of SADC to review aspects of the Protocol relating to the enforcement and binding effect thereof in various countries. This happened as a result of the Applicant denying that the rulings and judgments of the Tribunal are binding on it, and the Court was not apprised of this review process.

14

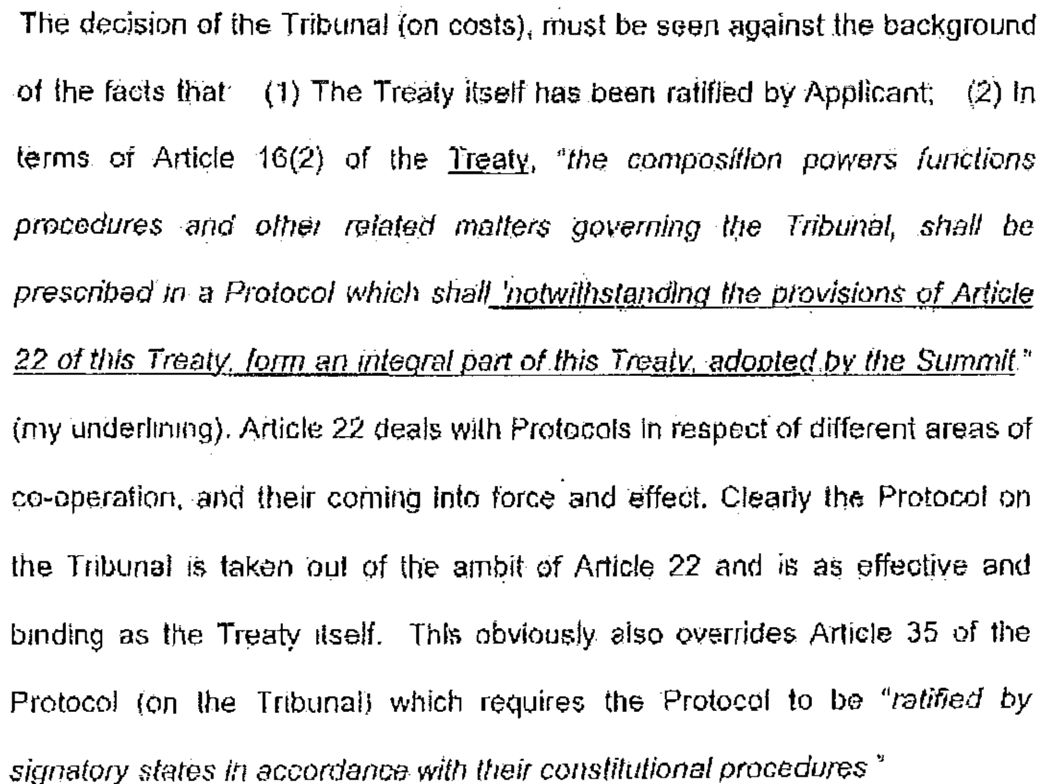
The argument on the ratification of the Protocol in Zimbabwe is based on Article 35 of the Protocol which simply states that: *"the Protocol shall be ratified by signatory states in accordance with their constitutional procedures."* In terms of the Zimbabwean constitution treaties with foreign states must be ratified by its Parliament. It is common cause that this has not happened. This issue has however received a few judicial expressions. Firstly the Tribunal itself, in the so-called *"Campbell case"*, case number SADC (T) 2/2007, decided that the Tribunal's decisions are binding on the Applicant. In that case Applicant not only took part in the proceedings, but its representative, the Acting Attorney General, admitted to the Court that the Applicant is bound by the Tribunal's decisions (see page 820 of the record). The Applicant even went further and nominated its own Judge to that forum, but later recalled him. In argument before this Court it was submitted that the Applicant is not bound by that admission, however no basis could be laid for that submission and it is rejected.

15.



The **second decision** is one from Applicant's own High Court in **Gramara (Pvt) Ltd and Another v The Government of the Republic of Zimbabwe and Two Others, Case Number HC5483/09.** In that case Patel J found that although the Applicant is bound by the decisions of the Tribunal, it refused an application to register the Tribunal's decision in Zimbabwe. The two Applicants in that case were part of the 79 Applicants in the Campbell case referred to above. The basis of the refusal of the Court was that it would be contrary to Applicant's public policy relating to expropriation without compensation of the land of white agricultural farmers (see pages 1074 and 1079 of the record).

16.



The decision of the Tribunal (on costs), must be seen against the background of the facts that (1) The Treaty itself has been ratified by Applicant; (2) In terms of Article 16(2) of the Treaty, *"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."* (my underlining). Article 22 deals with Protocols in respect of different areas of co-operation, and their coming into force and effect. Clearly the Protocol on the Tribunal is taken out of the ambit of Article 22 and is as effective and binding as the Treaty itself. This obviously also overrides Article 35 of the Protocol (on the Tribunal) which requires the Protocol to be *"ratified by signatory states in accordance with their constitutional procedures."*

314

17.

Of further importance are the following articles:

17.1 Article 4 of the Treaty.

SADC and its members shall act in accordance with the following principles:

a. *sovereign equalityof all Member States,*

b. *solidarity, peace ands security;*

c. *human rights, democracy and the rule of law;*

d. *peaceful settlement of disputes.*

17.2 Article 32 of the Treaty

Any dispute arising from the interpretation or application of this Treaty, which cannot be settled amicably, shall be referred to the Tribunal.

17.3 Article 14 of the Protocol:

The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relates to:

(a) The interpretation and application of the Treaty;

(b) The interpretation, application or validity of Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community.

17.4 Article 21 (of the Protocol):

"The Tribunal shall.

(a) Apply the Treaty, this Protocol ....

(b) Develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public International law and any rules and principles of the Law of States.

17.5 Article 24(3) (of the Protocol):

"Decisions and rulings of the Tribunal shall be final and binding."

18.

A further related matter to this issue is an amendment to the Protocol by:

18.1 Repealing Article 35 thereof dealing with ratification,

18.2 Providing that the agreement (to amend): *"Shall enter into force on the date of its adoption by ¾ of all member states"*

19.

This amendment was adopted by all the members' Heads of State at Blantyre on 14th August 2001. It came into operation on the 29th November 2002. The executive secretary of SADC informed all members of SADC that the amendment had officially come into operation (see page 143).

20.

There was some argument that the amendment had not come into operation, but on Applicant's own papers it clearly did. In any event it was never raised in the papers nor mentioned in the opening argument, where all the

Applicant's points for argument were set out in brief, and an applicant must make out its case in the founding papers.

21.

A further argument was that since it was an *ex parte* application, the Applicants in that case (presently the Respondents) had to put the Court fully into the picture with all relevant facts. In particular they failed to advise that Court of the requirements of Section 27 of the Supreme Court Act, 59 of 1959, and Section 13 of the FSIA. Furthermore, at least Section 27 has been found to be imperative. It is of course also true that the Court cannot override provisions of a law, as it can its own rules.

22.

Reference was also made to the case of **Bay Loan Investment (Pty) Ltd v Bay View (Pty) Ltd 1971 (4) SA 538 (C)** where the Court held that entering a notice of defence does not necessarily mean taking a further step and a Court will not likely assume a waiver. A party relying on waiver must prove it. If reliance is placed on conduct, such conduct must be inconsistent with the intention to maintain a right. It was submitted that a waiver could only be inferred after an affidavit (or pleading) on the merits was filed, and no issue was taken with short service. It was also submitted that it could be raised *in limine* in Court. Of course Applicant was not present in Court to raise these issues and did not do it at any other time. The only inference then to be drawn

is that a defendant/respondent does not wish to oppose the application. The argument on that score must then fail.

23.

On this issue mention must be made of an e-mail letter recently sent to me from the applicant's attorney's offices. In the letter it is stated that reference was made, during the hearing, of a letter sent to the Registrar of this court, setting out its reasons for withdrawing its intention to defend, (i.e. after having received legal advice), and setting out its defences, i.a. relating to its immunities. This letter was now received after the judgment had been almost completed. There was no affidavit attached to it. It does not seem to have been sent to the other parties. In court there was only scant reference to the possibility of such a letter having been sent to the Registrar. It was not finalised. There is no evidence that the letter reached the Registrar. It was definitely not on the file at any stage while in my possession. If any reliance is to be put on it, it should have been raised in the founding papers, which it was not. Under those circumstances no adherence will be given to it.

24.

The last issue on this case is the issue of the Applicant's Immunity as claimed by him in terms of Section 2(1) of the FSIA. Although this is a pre-Constitution act, it must still be interpreted in the light of our Constitution in the sense that the Court must *"promote the spirit"* purport an objects of the Bill of Rights (Section 39(2)). Section 39(1)(b) of the Constitution further requires the Court to *"consider international law"*.

25.

Even before the advent of our Constitution, our Courts held that there is good reason to believe that the rule of sovereign immunity has undergone an important change, and that the old doctrine of absolute immunity has yielded to a restrictive doctrine. This was clearly spelt out by Margo J in the case of **Inter-Science Research and Development Services (Pty) Ltd v Repubica Popular De Mocambique 1980 (2) TPD 120 C – 122 H.** This change has, in fact been entrenched in Section 4 of the FSIA. However, by the same reasoning as set out in the abovementioned case and the cases referred to therein, it is submitted by the Respondents that foreign immunity has also undergone a change in further fields. It would seem to me that in the present case this extension should also be applied in relation to human rights affairs. I say this with specific reference to the SADC Treaty and its implications. In terms of the Treaty itself, the Protocol on the Tribunal is part of the Treaty and as such becomes part of national law Furthermore, a treaty, like any other agreement, remains an "*agreement*". Section 3(2) of FSIA specifically provides for a waiver of immunity "*by prior written agreement*". Since the Applicant has subscribed to the Treaty, and therefore also the Protocol, then at least on a restricted interpretation of international immunity, it would mean that this Court has jurisdiction over the Applicant. This approach is further strengthened by the provisions of Article 6 of the Treaty which reads as follows:

319

"1. *Member states undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles; the achievement of its objectives and the implementation of the provisions of the Treaty.*

2. *SADC and member states shall not discriminate against any person on grounds of gender, religion .....*

3. *SADC shall not discriminate against any member state.*

4. *Member states shall take all steps necessary to ensure the uniform application of this Treaty.*

5. *Member states shall take all necessary steps to accord this Treaty the force of national law.*

6. *Member states shall co-operate with and assist institutions of SADC in the performance of their duties."*

(My emphasis.)

Having signed the Treaty and adopted it, and in view of the reasoning already referred to earlier, it is not for the Applicant to now renege on its obligation to

fully import the obligations of the Treaty and the Protocol. Under those circumstances to it seems to me that the Applicant has clearly waived its right to immunity in terms of the Treaty, and/or the FSIA.

26.

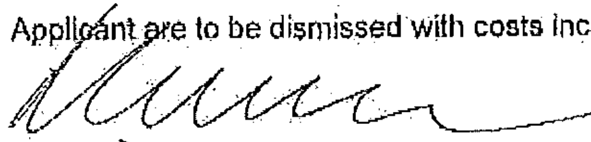
On the facts and reasoning set out above, it is clear to me that

26.1 The writs issued by this Court cannot be attacked on any grounds;

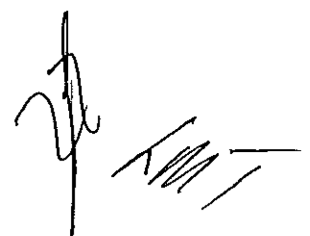
26.2 The Court granting the registration order, had the necessary jurisdiction and power to do so;

26.3 The writ issued in respect of at least one of the properties of the Applicant, was properly obtained, in the sense that the one property is not subject to immunity. However, until the writ and the order are served on the Applicant, which has not yet happened, that writ cannot be executed. That at least is common cause. Furthermore, since the judgment of Lamont J is not under attack in this court, I must accept it as being correct. At least that property then makes the order of Rabie J enforceable.

In the light of all that has gone before it is clear that all the applications by the Applicant are to be dismissed with costs including the costs of two counsel.



R D CLAASSEN
Judge of the High Court



GRAMARA (PRIVATE) LIMITED
and
COLIN BAILIE CLOETE
versus
GOVERNMENT OF THE REPUBLIC OF ZIMBABWE
and
ATTORNEY-GENERAL OF ZIMBABWE
and
NORAMN KAPANGA (INTERVENER)

HIGH COURT OF ZIMBABWE
PATEL J

Opposed Application

HARARE, 24 November 2009 and 26 January 2010

Adv. L. Uriri, for the applicants
Mrs. F. Maxwell, for the respondents
Mr. G. N. Mlotshwa for the intervener

PATEL J: the two applicants herein ere parties together with 77 others in a matter that was adjudicated by the Southern African Development Tribunal (the Tribunal) in the case of *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe* Case No. SADC (T) 2/2007. The Tribunal gave its judgment in favour of the applicants on the 28th of November 2008. They now seek an order for the registration of the decision of the Tribunal for the purposes of its enforcement in Zimbabwe.

Before dealing with the main issues in this matter, it is necessary to attend to several preliminary issues that have arisen for determination.

Applications for Condonation

The applicants filed and served their Heads of Argument herein on the 6th of July 2009. Four months later, on the 5th of November 2009, the respondents filed an application in Case No HC 5483/09 for the condonation of the late filing of their Heads and for the admission into evidence of a supplementary affidavit. The intervener was even more sluggish and only

filed his Heads one day before the hearing of this matter. His counsel then sought condonation at the hearing itself.

In view of the importance of this case and in order that all the relevant issues be fully ventilated, both applications were granted by consent. However, given the inordinate delay in filing their application, the respondents were ordered to pay the applicants' costs in respect of Case No. HC 5483/09.

Application for Joinder

The intervener in this matter avers that he is the holder of an offer letter to hold, use and occupy the property held by the applicants and that the effect of relief sought by the applicants would be to nullify his offer letter. He accordingly submits that he has a direct personal and legal interest in the outcome of this case and should therefore be jointed in opposition as the 3rd respondent.

The applicants oppose the intervener's application for joinder on the grounds that he does not have any direct or substantial interest in the subject-matter of these proceedings and that, in any event, he has not furnished any written proof of his acceptance of the State's offer. Moreover, registration of the Tribunal's judgment *per se* will not have the effect of dispossessing him of his right to occupy the property. That would only occur at a later stage, if and when separate proceedings are instituted for the enforcement of the judgment by way of eviction proceedings against him.

In terms of section 16B(2) of the Constitution, ownership of the property in question vests in the State. Any right of occupation conferred by the offer letter is in the nature of a personal right, deriving from the State's ownership of the property. Therefore, even if the intervener were to establish his acceptance of the State's offer, which on the papers he has failed to do, his right to occupy the land is purely derivative.

328

On the other hand, the papers indicate that there are two other matters currently pending before this Court, in Case Nos. HC 7256/07 and HC3995/08, which involve a dispute between the applicants and the intervener concerning their respective rights to occupy ad use the farm I question. The effect of granting the relief sough *in casu* would be to pre-empt and render academic the outcome of those two cases. More significantly, it seems somewhat artificial and casuistic to argue that registration of the Tribunal's judgment is entirely separate and distinct from the consequential enforcement of that judgment. While proceedings for the enforcement of the judgment may entail a different process, registration of the judgment will substantially operate to negate the intervener's rights in terms of the offer letter and he will be left with no defence whatsoever to any action taken by the applicants in enforcing the judgment. If he is not afforded the opportunity to be heard at this stage, he would clearly be prejudiced in the assertion and protection of the personal contractual right of occupation that he claims to the property *in casu*. See *Rose v Arnold & Others* 1995 (2) ZLR 17 (H); *Nyamweda v Georgias* 1988 (2) ZLR 422 (SC).

In the event, I am satisfied that the intervener has established a sufficiently direct and substantial interest in the outcome of these proceedings. His application to be joined as a party to this case is accordingly granted, but with no order as to costs.

Enforcement of Tribunal's Judgments

The jurisdiction and powers of the Tribunal are spelt out in the Treaty of the Southern African Development Community (the SADC Treaty) and in the Protocol of the Tribunal. (The jurisdictional competence of the Tribunal, which competence is challenged by the respondents, is a matter that I shall revert to at a later stage). As regards the enforcement of the Tribunal's decisions, this is governed by Article 32 of the Protocol as follows:

"1. The law and rules of civil procedure for the registration and enforcement of foreign Judgments in force in the territory of the State in which the judgment is to be enforced shall govern enforcement.

2. States and institutions of the Community shall take forthwith all measures necessary to ensure execution of the decisions of the Tribunal.

3. Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned.

4. Any failure by a State to comply with a decision of the Tribunal by any party concerned.

5. If the Tribunal establishes the existence of such a failure, it shall report its finding to the Summit for the latter to take appropriate action."

The overall effect of these provisions is that the decisions of the Tribunal are binding and enforceable within the territories of Member States which are under an obligation to take the measures necessary for the execution of those decisions. However, such enforcement is governed by the rules of civil procedure for the registration and enforcement of foreign judgments which are in force in the territory of the State in which the particular judgment is to be enforced. In other words, it is the domestic rules of procedure of each Member State, as opposed to any uniform adjectival law of the Tribunal, which must govern the enforcement of a given judgment in the territory of that State.

Where any Member State fails to comply with specific decision of the Tribunal that it is bound by, such non-compliance is referable in the first instance to the Tribunal, which must then refer the matter to the Summit for the latter to take appropriate action. However, Article 32 does not explicate what remedial action may be taken, or by which authority or institution, in the

event of a Member State's failure to comply with its broad obligation to take the measures necessary for the execution of the decisions of the Tribunal generally.

It is common cause that Zimbabwe has not taken any specific internal measures to domesticate the SADC Treaty or the Protocol of the Tribunal. More specifically, no legislative or administrative steps have been taken to implement Zimbabwe's obligations under Article 32 or to transform those obligations into effectual provisions of the municipal law.

Nevertheless, as is correctly contended for the applicants, a State cannon invoke its own domestic deficiencies in order to avoid or evade its international obligations or as a defence to its failure to comply with those obligations. The fundamental tenet of international law is that *pacta sunt servanda,* viz. every party to treaty in force is required to perform its obligations thereunder in good faith and, as justification for its failure to perform the treaty. See Articles 26 and 27 of the Vienna Convention on the Law of Treaties (1969); see also Shaw: *International Law* (4th ed. 1997) at 104.

However, it does not follow, as is further contended on behalf of the applicants, that the primacy of treaty obligations at international law must necessarily and invariably be taken into account in applying domestic law at the municipal level, even where there is a clear conflict between the two regimes. As I have recently had occasion to opine in *Route Toute BV & Others v Minister of National Security Responsible for Land, Land Reform and Resettlement & Others* HH 128-2009, At pp. 17-18:

"On the pragmatic approach that has come to be adopted in international practice, neither legal system enjoys primacy over the other. In principle, they both hold sway and supremacy in their respective domains. See Brownlie: *Principles of Public International Law* (4th ed.) at pp. 34-35. The resultant divergence between the two systems is reconciled on the basis that the State

incurs international responsibility for having violated its international obligations and must accordingly effect the requisite reparations in order to satisfy its international obligations and must accordingly effect the requisite reparations in order to satisfy its international responsibility. See Brownlie, *op. cit.,* at pp. 35-37."

Registration of Foreign Judgments in Zimbabwe

Insofar as concerns the registration of foreign civil judgments, the relevant statutory provisions presently in force in Zimbabwe are contained in the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*]. Section 3 of this Act extends the application of the Act to the judgments of any international tribunal designated for that purpose. The word "judgment" is defined in section 2 of the Act to mean "a judgment or order given or made by any court or tribunal requiring the payment of money, and includes an award of compensation or damages to an aggrieved party in criminal proceedings". The judgment that the applicants seek to register herein is essentially declaratory and injunctive in nature and is not one sounding I money. Moreover, it is common cause that the decisions of the SADC Tribunal are not registrable or enforceable in terms of Chapter 8:02 for the simple reason that the Tribunal has not been specifically designated under the Act.

In any event, the Act is clearly not exhaustive in the coverage of its provisions. Section 25 accords with the general rule of statutory interpretation that the common law cannot be ousted except by clear language or in express terms.

Both in England and in South Arica, it is well established that foreign judgments are recognizable and enforceable under the common law. See North and Fawcett: *Cheshire and North's Private International Law* (13th ed. 2004) at 407; Forsyth: *Private International Law* (4th ed. 2003) at 389. In South Africa, the procedure for and scope of recognition proceedings are

lucidly expounded in Joubert (ed.): *The Law of South Africa* (First Reissue, 1993) Vol. 2 at para. 476, as follows:

> "……….. the present position is that a foreign judgment is not directly enforceable in South Africa; but if it is pronounced by a proper court of law and certain requirements are met any determination therein (for example of a party's rights or status) will be recognized and the judgment will in fact found a defence of *res judicata* if it would have founded such a defence had it been a South African judgment. In addition, an authenticated foreign judgment constitutes a cause of action and as such is enforceable by ordinary action in a South African court, including, where appropriate, an action for provisional sentence or for a declaratory order or for default judgment.
>
> A South African court will not pronounce upon the merits of any issues or factor of law tried by the foreign court and will not review or set aside is findings though it will adjudicate upon a 'jurisdictional fact' establishing international competency".

The general requirements for recognition and enforcement of foreign judgments are set out in Joubert (*op. cit.*), at para. 477. These requirements were adopted and applied by the Appellate Division in *Jones v Krok* 1995 (1) SA 677 (A) at 685B-E and in *Purser v Sales* 2001 (3) SA 445 (SCA) at 450D-G. I *Jones's* case, CORBETT CJ summarized these requirements as follows:

"As explained in Joubert………, the present position in South Africa is that a foreign judgment is not directly enforceable, but provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognized by our law with reference to the jurisdiction of foreign courts (sometimes referred to as 'international jurisdiction or competence') (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and

enforcement of the judgment by our Courts would not b e contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involved the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended."

In the present matter, counsel have not referred me to any Zimbabwean case authority on the subject, either following or deviating from the South African position, and I have been unable to readily locate any. I accordingly take the view, pursuant to the provisions of section 89 of the Constitution governing the law to be administered by our courts, that our common law position is *ad idem* with the common law of South Africa as stated in the authorities cited above and that is has not been overtaken or significantly modified by local statute.

One further aspect that was not raised by counsel but which I need to canvass relates to the scope of recognition proceedings vis-à-vis the nature of the remedies that may properly be recognized and enforced through a foreign judgment. The provisions of Chapter 8:02 and the two cases cited above deal primarily with judgments sounding in money. They do not address administrative consequences as is the case with SADC Tribunal decision *in casu*. Nevertheless, having regard to the general rules articulated in Joubert (*op. cit.*) at para. 476, coupled with considerations of international comity in a globalised world, and provided that the judgment in question has been duly delivered by a court of recognized international competence and jurisdiction, it seems to me that it would be contrary to principle to restrict the scope of recognition proceedings by reference t the specific remedies enjoined by a given foreign judgment.

Issues for Determination

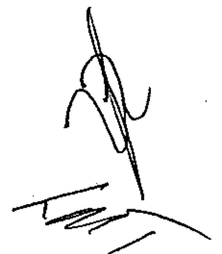
Notwithstanding the plethora of affidavit evidence and written legal argument filed of record, counsel for all of the parties herein concur that there are essentially two issues for determination *in casu*. The first is whether the SADC Tribunal was endowed with the requisite jurisdictional competence in the case before it. The second is whether the recognition and enforcement of the Tribunal's decision in that case would be contrary to public policy in Zimbabwe.

Jurisdiction Competence

It is trite that any jurisdictional fact which negates the existence of any obligation imposed by a foreign judgment constitutes an effective bar to the actionability of that judgment. One such obvious negativing fact would be that the party impeaching the judgment owes no duty to obey the command of the court or tribunal purporting to impose the obligation.

The respondents' position on the status of the Tribunal is as follows. The Agreement amending the SADC Treaty (The Amendment Agreement), which was signed on the 14th of August 2001, never entered into force because it was not ratified by Zimbabwe or by the prescribed number of SADC Member States. Therefore, in terms of Article 22 of the Treaty as unamended, the Protocol of the Tribunal still requires the ratification of a Member State in order for that State to be bound by it. Since Zimbabwe has not ratified the Protocol, it is not bound by it and is not subject to the jurisdiction of the Tribunal. Consequently, the Tribunal lacked the requisite competence to adjudicate the *Campbell* case and, therefore, its judgment in that case cannot be registered and enforced in Zimbabwe or anywhere else.

The Vienna Convention on the Law of Treaties (1969) is generally recognized as an authoritative restatement of established or emergent rules of international customary law on the subject of treaties. See Brownlie, *op.cit.*,



at 604. Article 39 of the Convention states the general rule regarding the amendment of treaties, as follows:

> "A treaty may be amended by agreement between two parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."

Part II of the Convention regulates the conclusion and entry into force of treaties and, by dint of Article 39, it also governs the conclusion and entry into force of treaty amendments. Article II prescribes the means of expressing consent to be bound by a treaty and provides that:

> "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

Article 24 of the convention governs the entry into force of treaties and, in its relevant portions, stipulates that:

> "1. 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.
>
> 2. Failing any such provision or agreement, a treaty enters into force as soon as a consent to be bound by the treaty has been established for all the negotiating States."

Taken together, these provisions of the Convention illustrate the flexibility inherent in the conclusion and entry into force of treaties as well as amendments thereto. In particular, Article 11 makes it clear that the consent of States to be bound by a treaty may be expressed by signature, exchange of instruments, ratification or accession, or by any other means if so agreed. Thus, the States concerned are at liberty to agree on the conclusion of a treaty by means other than the traditionally accepted procedure of signature

followed by ratification or accession. It is therefore perfectly possible for a treaty or an amendment of the treaty to be **adopted** and enter into force for all the adopting States instantly, without further ratification or any other formality, if that is the means of adhesion agreed to by those States. See Aust: *Modern Treaty Law and Practice* (2000) at 90.

Turning to the SADC Treaty itself, Articles 39, 40 and 42 of the Treaty deal respectively with signature and ratification of and accession to the Treaty. Article 41 governs the entry into force of the Treaty as follows:

> "This Treaty shall enter into force thirty (30) days after the deposit of the instruments of ratification by two thirds of the States listed in the Preamble."

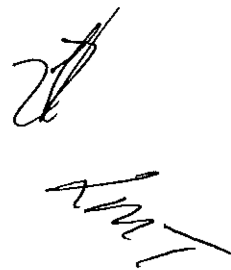
Article 39 makes it abundantly clear that ratification by two-thirds of the signatory States was a pre-requisite for the entry into force of the Treaty itself. However, amendments to the Treaty are governed by an entirely different procedure prescribed in Article 36.1, as follows:

> "An amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit."

The term "Summit" is defined in Article 1 of the Treaty as:

"...... the Summit of the Heads of State or Government of SADC established by Article 9 of this Treaty".

Article 10 of the Treaty (in its unamended form) is instructive as to the composition of the Summit and its decision-making process. It provides as follows in its relevant portions:



"1. The Summit shall consist of the Heads of State or Government of all Member States, and shall be the supreme policy-making institution of SADC.

3. The Summit shall adopt legal instruments for the implementation of the provisions of this Treaty ....

8. Unless otherwise provided in this Treaty, the decisions of the Summit shall be by consensus or shall be binding."

The combined effect of these provisions is that an amendment to the Treaty is not concluded by way of ratification by Member States but is adopted by a decision of not less than three-quarters of the Summit, comprising the Heads of State or Government of all Member States. Furthermore, the decision of the Summit to adopt the amendment is binding on all Member States. The amendment becomes operative immediately thereafter and there is no need for any further ratification by Member States in order to bring the amendment into force and effect.

Turning to the Amendment Agreement itself, the Preamble thereto, in its relevant portions, declares that:

"We, the Heads of State or Government of [all the Member States] .... HAVE AGREED, pursuant to Article 36 of the Treaty, to amend the Treaty as follows: ...."

Article 32 of the Agreement provides for its entry into force, in conformity with Article 36.1 of the Treaty, as follows:

"This Agreement shall enter into force on the date of its adoption by three-quarters of all Members of the Summit."

Article 22 of the SADC Treaty, both in its original and amended form, requires the signature and ratification of any Protocol approved by the SADC

Summit. Article 9.1(f) as read with Article 16 provides for the establishment of the SADC Tribunal. Article 16.2 as amended provides that:

> "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."
>
> [amendment underlined]

The meaning and effect of the amending words are clear, to wit, the Protocol of the Tribunal forms an integral part of the Treaty without the need for its ratification by the Member States. To clarify this position and dispel any doubt on the matter, all the Member States, including Zimbabwe concluded and signed the Agreement Amending the protocol on Tribunal on the 3rd of October 2002. By virtue of Articles 16 and 19 of this Agreement, Articles 35 and 38 of the Protocol of the Tribunal, which required ratification of the Protocol by two-thirds of the Member States, were repealed *in toto*, thereby obviating the need to ratify the Protocol.

To conclude this aspect of the case, my assessment of and determination on the jurisdictional capacity of the Tribunal is as follows. On the 14th of August 2001, the Amendment Agreement was signed by 13 out of the 14 Heads of State or Government of the Member States, including Zimbabwe, thereby concluding the process of its adoption and entry into force. In my view, there can be no doubt whatsoever that the Agreement was duly adopted in terms of Article 36.1 of the Treaty and that it became binding upon all the Member States on the date of its adoption. It follows that as from that date, by virtue of Article 16.2 of the Treaty as amended, the Protocol of the tribunal constituted an integral part of the Treaty and became binding on all Member States without the need for its further ratification by them. It also follows that the Republic of Zimbabwe thereupon became subject to the

jurisdiction of the tribunal and that the jurisdictional competence of the Tribunal in the *Campbell* case, which was heard and determined in 2008, cannot now be disputed.

The respondents' position in this regard, premised on the *ex post facto* official pronouncements repudiating the Tribunal's jurisdiction, is essentially erroneous and misconceived. Their position is rendered even more untenable by the conduct of SADC governments, including the Government of Zimbabwe, subsequent to tbe adoption of the Amendment Agreement, which conduct has been entirely consistent with the provisions of the Treaty as amended by the Agreement. I refer, in particular, to the establishment of the Troika system and the Organ on Politics, Defence and Security Cooperation, in terms of Articles 9 and 9A of the Treaty (as amended by Articles 9 and 10 of the Agreement), and note that Zimbabwe has fully participated, together with all the other Member States, in the Troika system and the business of the newly constituted Organ. It seems to me legally unsustainable to espouse a major facet of the amended SADC regime and to simultaneously eschew those features of the same regime that are deemed to be politically inexpedient and unpalatable.

Before concluding, I think it is necessary to mention one jurisdictional issue that was not canvassed by the parties, either in their affidavits or in argument, relative to the scope of the Tribunal's jurisdiction in terms of the SADC Treaty and its governing Protocol. In the case before it, the Tribunal relied upon the provisions contained in Articles 4(c) and 16 of the Treaty as read with Articles 14 and 15 of the protocol to conclude that it was duly empowered to adjudicate any dispute concerning human rights, democracy and the rule of law. The jurisdiction of the tribunal encompasses all disputes between States and between natural and legal persons and States relating to the interpretation and application of the Treaty. Despite this broad formulation, I am not entirely persuaded that the general stricture enunciated

in Article 4(c) of the Treaty, which requires SADC and the Member States to act in accordance with the principles, *inter alia*, of "human rights, democracy and the rule of law", suffices to invest the Tribunal with the requisite capacity to entertain and adjudicate alleged violations of human rights which might be committed by Member States against their own nationals. Be that as it may, this is not an issue that was specifically raised in these proceedings and it would therefore be inappropriate for me to deal with this jurisdictional point *mero motu* at this juncture.

Public Policy

As already stated above, a foreign judgment cannot be recognised and enforced if it is contrary to public policy. As is succinctly put in Joubert (*op. Cit*) at para. 425:

> "................ a foreign judgment will not be recognised or enforced if
>
> It is in conflict with an overriding statute, if its terms conflict with public policy or if it was obtained without observance of the principles of natural justice."

What constitutes public policy in any given country is a matter that eludes precise definition. The notion is clearly not immutable and must perforce vary with time, place and circumstance, in tandem with changing social *mores*. Antecedent case authorities are obviously highly persuasive but may not always be germane or decisive.

In the instant case, public policy must be considered not only in the closed confines of the domestic sphere but also in the larger regional and international context. In principle, it would generally be contrary to public policy for any State to violate its international obligations within the domestic realm. As already stated above, every State party to a treaty in force is required to perform its obligations in good faith and, concomitantly, it cannot invoke its municipal law so as to absolve itself from its obligations at

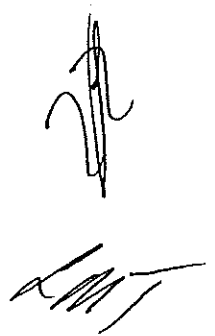
341

international law. Apart from being embodies and codified in Article 26 and 27 of the Vienna Convention of the Law of treaties (1969), these rules also form part of international customary law. See Shaw *(op. Cit.)* at 104.

As was stated in the *Route Toute BV* case (*supra*) at pp. 10-11, the position in most Commonwealth jurisdictions is that customary international law is generally regarded as having internally incorporated insofar as it is not inconsistent with statute law and judicial precedent. This position was affirmed by the Supreme Court, albeit *obiter*, in *Barker McCormac (Pvt) Ltd v Government of Kenya* 1983 (2) ZLR 72 (SC) at 77, where it was observed that customary international law forms part of the law of Zimbabwe except to the extent that it is in conflict with statute or prior judicial precedent. Inasmuch as Zimbabwe is bound by the decisions of the SADC Tribunal at international law, by dint of its treaty obligations as well as international custom, it would be inconsistent with the public policy of Zimbabwe not to recognise and enforce any decision of the Tribunal at the municipal level, except insofar as that decision conflicts with statute or prior judicial precedent.

There is a further international dimension to the public policy of Zimbabwe. By adhering to the SADC Treaty as well as the Amendment Agreement and, therefore , by submitting to the jurisdiction of the Tribunal, the Government of Zimbabwe has created an enforceable legitimate expectation, both within and beyond the borders of Zimbabwe, that it would comply with the requirements of the Treaty and abide by the decisions of the Tribunal. Moreover, in terms of Article 32 of the protocol of the tribunal, the Government has bound itself to enforce the decisions of the tribunal in accordance with domestic procedural law, and has thereby created a further legitimate expectation that it would act accordingly.

These points are illustrated by the decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 [(1995) 128 ALR 353] where Australia had ratified the United Nations Convention on the Rights of the Child



but had not taken any steps to implement the Convention by statute. It was held by the High Court of Australia that despite the failure to incorporate the Convention in the domestic law of Australia, individuals had a legitimate expectation that the government would act in accordance with the Convention.

In the instant case, the legitimate expectation that the Government would adhere to the decisions of the Tribunal and take steps to enforce those decisions in the domestic sphere must be regarded as an intrinsic aspect of public policy in Zimbabwe. On that basis, the recognition and enforcement of the Tribunal's decisions would not be contrary to the public policy of Zimbabwe.

The above propositions must be taken to apply in principle to the decisions of the Tribunal generally. In other words, as a rule, public policy dictates that the tribunal's decisions, made within the bounds of its international jurisdictional competence, be recognised and enforced in Zimbabwe. However, in my view, the application of this general rule is subject to consideration of the facts of each individual case and the legal and practical consequences of recognising and enforcing the Tribunal's decision in that particular case in Zimbabwe.

Turning specifically to the decision in the *Campbell* case, the findings and ruling of the tribunal, insofar as they are relevant *in casu*, may be summarised as follows: (i) fair compensation is payable to the applicants, and must be paid by a fixed date to 3 of the applicants who have already been evicted, for their lands compulsorily acquired by the Government of Zimbabwe; (ii) the Government is in breach of its obligations under Articles 4(c) and 6(2) of the SADC Treaty (pertaining to human rights, democracy and the rule of law and the principle of non-discrimination); (iii) Amendment 17 (see below) is in breach of Articles 4(c) and 6(2) of the Treaty; (iv) the Government is directed to take all necessary measures to protect the possession, occupation and ownership of the lands of the applicants and to

343

ensure that no action is taken, pursuant to Amendment 17, to evict the applicants from their lands or to interfere with their peaceful residence thereon.

It is common cause that the Government of Zimbabwe embarked on a programme of land reform in the year 2000. The programme was constitutionally recognised in section 16A of the Constitution, which section was introduced by Constitution of Zimbabwe Amendment (No 16) Act 2000. Subsequently, the programme was further entrenched when the Legislature enacted section 16B through the Constitution of Zimbabwe Amendment (No. 17) Act 2005. The legal effect of section 16B(2)(a) was to compulsorily acquire all agricultural land that was identified in the notices of acquisition itemised in the newly inserted Schedule 7. Consequently, full title in such land vested in the State with effect from the 14th of September 2005. Moreover, by virtue of section 16B(2)(b), no compensation is payable for this land except for any improvements effected thereon before it was acquired. In terms of section 16B(6), it was envisaged that an Act of Parliament would be framed to make it a criminal offence for any person, without lawful authority, to possess or occupy any land referred to in section 16B. Subsequently, such legislation was duly enacted in the gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] which came into operation on the 20th of December 2006.

The legality of the land reform programme was considered in *Mike Campbell (Pvt) Ltd & Another v Minister of Security Responsible for Land, Land reform and resettlement & Another SC 49/07.* In essence, the Supreme Court confirmed the constitutionality of the programme as implemented under section 16B of the Constitution. Counsel for the respondents submits that the judgment of the SADC Tribunal is in total disharmony with the decision of the Supreme Court in Case No. SC 49/07. Although I do not perceive any direct conflict between the two decisions inasmuch as the Supreme Court was seized with the constitutionality of the programme under

domestic law while the Tribunal's judgment centres on the violation of rights and obligations under the SADC Treaty, it must nevertheless be accepted that the indirect consequence of the Tribunal's judgment is to impugn the legality of the programme sanctioned by the Supreme Court. The potential conflict between the two decisions is actualised in the instant case because the effect of registering the Tribunal's judgment in Zimbabwe would be to challenge the decision of the Supreme Court within its jurisdiction domain and thereby undermine the authority of that Court in Zimbabwe. Any such result could surely not be contemplated as conforming with public policy in Zimbabwe and must militate against the registration of the tribunal's decision by this Court.

In any event, there is a further and more direct basis for declining the registration and consequent enforcement of the Tribunal's decision in this country. As indicated above, the decision directs the Government of Zimbabwe to do several things. In particular, the Government is ordered to protect the possession, occupation and ownership of the lands of the applicants. It must also ensure that no action is taken to evict the applicants from their lands or to interfere with their peaceful residence thereon. In addition, it is required to pay fair compensation to the applicants for their lands compulsorily acquired by the Government.

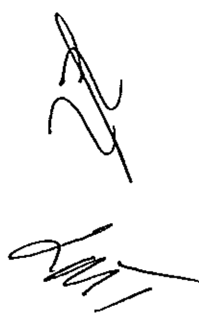
As already indicated, the applicants' lands were acquired by the Government in terms of section 16B of the Constitution without any compensation payable in respect of the land itself. If the Tribunal's judgment were to be registered by this Court and subsequently voluntarily complied with or enforced by court orders, the Government would be required to contravene and disregard what Parliament has specifically enacted in section 16B of the Constitution. This, in my view, simply cannot be countenanced as a matter of law, let alone as an incident of public policy. Section 3 of the Constitution proclaims what is axiomatic, viz. that:

"This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

The obvious implications of the supremacy of the Constitution are twofold. Firstly, to the extent that the common law is invoked to enforce a foreign judgment, the common law must be construed and applied so as to conform with the Constitution and any feature of the judgment that conflicts with the Constitution cannot, as a matter of public policy, be recognized or enforced in Zimbabwe. The notation of public policy cannot be deployed and insinuated under cover of the common law to circumvent or subvert the fundamental law of the land. Secondly, I consider it to be patently contrary to the public policy of any country, including Zimbabwe, to require its government to act in a manner that is manifestly incompatible with what is constitutionally ordained.

Although the Tribunal's decision, strictly regarded, is confined to the 79 applicants before it, its ramifications extend to the former owners of all the agricultural land that has been acquired by the Government since 2000 in terms of 16B of the Constitution. In effect, enforcement of the decision vis-à-vis the 79 applicants in particular and compliance with it generally would ultimately necessitate the Government having to reverse all the land acquisitions that have taken place since 2000. Apart from the political enormity of any such exercise, it would entail eviction, upheaval and eventual relocation of many if not most of the beneficiaries of the land reform programme. This programme, despite its administrative and practical shortcomings, is quintessentially a matter of public policy in Zimbabwe, conceived well before the country attained its sovereign independence.

As for the doctrine of legitimate expectation, the applicants before the Tribunal and others in their position are absolutely correct in expecting the Government of Zimbabwe to comply with its obligations under the SADC



Treaty and to implement the decisions of the Tribunal. However, I take it that there is an incomparably greater number of Zimbabweans who share the legitimate expectations that the Government will effectively implement the land reform programme and fulfil their aspirations thereunder. Given these countervailing expectations, public policy as informed by basic utilitarian precept would dictate that the greater public good must prevail.

In the result, having regard to the foregoing considerations and the overwhelmingly negative impact of the tribunal's decision on domestic law and agrarian reform in Zimbabwe, and notwithstanding the international obligations of the Government, I am amply satisfied that the registration and consequent enforcement of that judgment would be fundamentally contrary to public policy of this country.

Costs

The applicants have not succeeded in the eventual outcome of this case. Nevertheless, it cannot be doubted that the issues raised herein are matters of paramount public importance and that their proper ventilation in there proceedings is of public value and benefit. I therefore deem it just and equitable that the parties should bear their own legal costs.

The application is accordingly dismissed with no order as to costs.

Justice B Patel

Gollop & Blank, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners

Mlotshwa & Co., intervener's legal practitioners

BEFORE THE AFRICAN COMMISSION
(HELD AT BANJUL, THE GAMBIA)

Case no:

LUKE MUNYANDU TEMBANI	First applicant
BENJAMIN JOHN FREETH	Second applicant
and	
SUMMIT OF HEADS OF STATE OR GOVERNMENT OF SADC	First respondent
COUNCIL OF MINISTERS OF SADC	Second respondent
REPUBLIC OF ZIMBABWE	Third respondent
REPUBLIC OF ZAMBIA	Fourth respondent
REPUBLIC OF SOUTH AFRICA	Fifth respondent
REPUBLIC OF SEYCHELLES	Sixth respondent
REPUBLIC OF NAMIBIA	Seventh respondent
REPUBLIC OF MOZAMBIQUE	Eight respondent
REPUBLIC OF MAURITIUS	Ninth respondent
REPUBLIC OF MALAWI	Tenth respondent
REPUBLIC OF BOTSWANA	Eleventh respondent
REPUBLIC OF ANGOLA	Twelfth respondent
UNITED REPUBLIC OF TANZANIA	Thirteenth respondent
KINGDOM OF SWAZILAND	Fourteenth respondent
KINGDOM OF LESOTHO	Fifteenth respondent
DEMOCRATIC REPUBLIC OF CONGO	Sixteenth respondent

CONFIRMATORY AFFIDAVIT

I the undersigned

BENJAMIN JOHN FREETH

do hereby make oath and state:

1. I am a permanent resident of Zimbabwe, currently residing in Harare.

2. I have read the notice of communication and the affidavit of Mr Luke Munyandu Tembani and annexures thereto. I confirm the contents of all these documents insofar as they relate to me and other Campbell applicants, their families and workers

3. For the reasons set out in the communication, I join Mr Tembani in asking for the relief set out in the notice.

BENJAMIN JOHN FREETH

THIS IS TO CERTIFY THAT THE ABOVENAMED DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT WHICH WAS SIGNED AND SWORN TO BEFORE ME AT [illegible] ON THIS THE [illegible] DAY OF [illegible] 2011.

COMMISSIONER OF OATHS

...MSON SNELL & PASSMORE
...SDALE GARDENS
...RIDGE WELLS
... TN1 1NX

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no 20382/2015

In the intervention application between:

LUKE MUNYANDU TEMBANI	First applicant
BENJAMIN JOHN FREETH	Second applicant
RICHARD THOMAS ETHEREDGE	Third applicant
CHRISTOPHER MELLISH JARRET	Fourth applicant
TENGWE ESTATE (PVT) LTD	Fifth applicant
FRANCE FARM (PVT) LTD	Sixth applicant

and

LAW SOCIETY OF SOUTH AFRICA	First respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fourth respondent

In re:

LAW SOCIETY OF SOUTH AFRICA	Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Third respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

BENJAMIN JOHN FREETH

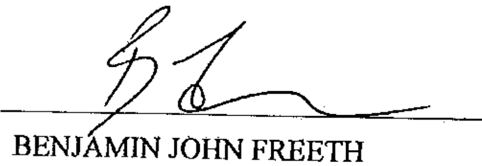
do hereby make oath and say:

1. I am the above-named second applicant. The facts to which I depose are within my own knowledge, and are true and correct. The submissions I advance are on the advice of my legal representatives.

2. I have read the notice of motion and founding affidavit by Luke Munyandu Tembani, the first applicant in this matter, supporting our application for leave to intervene as co-applicants in the main application.

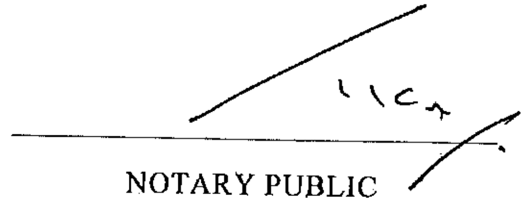
3. I confirm all references in it to me, and that he is duly authorised to act on my behalf in this matter.

4. For the reasons and on the grounds set out in the first applicant's affidavit, I ask that the relief sought in the intervention application and in the main application be granted.



BENJAMIN JOHN FREETH

Signed and sworn before me at HARARE on this 23rd day of JULY 2015 after the deponent declared that he is familiar with the contents of this statement and regards the prescribed oath as binding on his conscience and has no objection against taking the said prescribed oath.

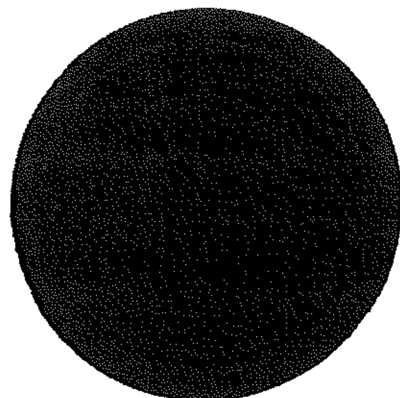


NOTARY PUBLIC

FULL NAMES: TIMOTHY FRANK MENNE TANSER

CAPACITY: NOTARY PUBLIC

ADDRESS: 16 FLEETWOOD ROAD,
ALEXANDRA PARK
HARARE
ZIMBABWE



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no 20382/2015

In the intervention application between:

LUKE MUNYANDU TEMBANI	First applicant
BENJAMIN JOHN FREETH	Second applicant
RICHARD THOMAS ETHEREDGE	Third applicant
CHRISTOPHER MELLISH JARRET	Fourth applicant
TENGWE ESTATE (PVT) LTD	Fifth applicant
FRANCE FARM (PVT) LTD	Sixth applicant

and

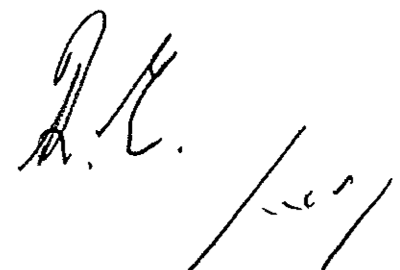
LAW SOCIETY OF SOUTH AFRICA	First respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fourth respondent

In re:

LAW SOCIETY OF SOUTH AFRICA	Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Third respondent



CONFIRMATORY AFFIDAVIT

I, the undersigned,

RICHARD THOMAS ETHEREDGE

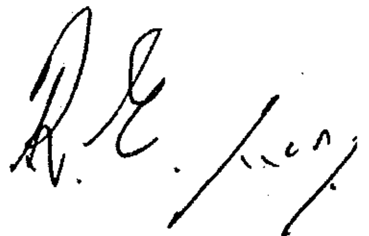
do hereby make oath and say:

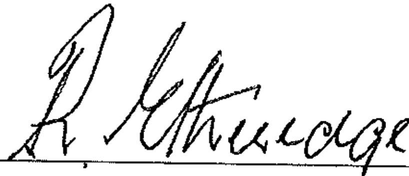
1. I am the above-named third applicant. The facts to which I depose are within my own knowledge, and are true and correct. The submissions I advance are on the advice of my legal representatives.

2. I have read the notice of motion and founding affidavit by Luke Tembani, the first applicant in this matter, supporting our application for leave to intervene as co-applicants in the main applicants.

3. I confirm all references in it to me, and that he is duly authorised to act on my behalf in this matter.

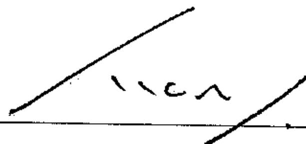
4. For the reasons and on the grounds set out in Mr Tembani's affidavit, I ask that the relief sought in the intervention application and in the main application be granted.





RICHARD THOMAS ETHEREDGE

Signed and sworn before me at HARARE on this 23rd day of JULY 2015 after the deponent declared that he is familiar with the contents of this statement and regards the prescribed oath as binding on his conscience and has no objection against taking the said prescribed oath.

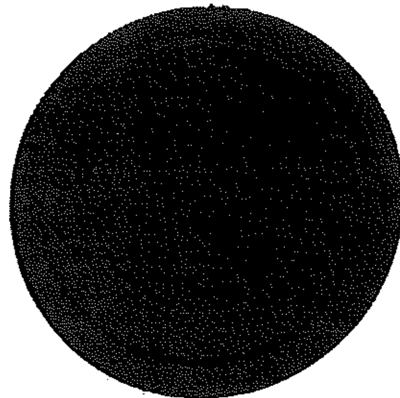


COMMISSIONER OF OATHS

FULL NAMES: TIMOTHY FRANK MENNE TANSER NOTARY PUBLIC

CAPACITY: NOTARY PUBLIC

ADDRESS: 16 FLEETWOOD ROAD,
ALEXANDRA PARK,
HARARE
ZIMBABWE



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no 20382/2015

In the intervention application between:

LUKE MUNYANDU TEMBANI	First applicant
BENJAMIN JOHN FREETH	Second applicant
RICHARD THOMAS ETHEREDGE	Third applicant
CHRISTOPHER MELLISH JARRETT	Fourth applicant
TENGWE ESTATE (PVT) LTD	Fifth applicant
FRANCE FARM (PVT) LTD	Sixth applicant

and

LAW SOCIETY OF SOUTH AFRICA	First respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fourth respondent

In re:

LAW SOCIETY OF SOUTH AFRICA	Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Third respondent

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no 20382/2015

In the intervention application between:

LUKE MUNYANDU TEMBANI	First applicant
BENJAMIN JOHN FREETH	Second applicant
RICHARD THOMAS ETHEREDGE	Third applicant
CHRISTOPHER MELLISH JARRETT	Fourth applicant
TENGWE ESTATE (PVT) LTD	Fifth applicant
FRANCE FARM (PVT) LTD	Sixth applicant

and

LAW SOCIETY OF SOUTH AFRICA	First respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fourth respondent

In re:

LAW SOCIETY OF SOUTH AFRICA	Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Third respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

CHRISTOPHER MELLISH JARRETT

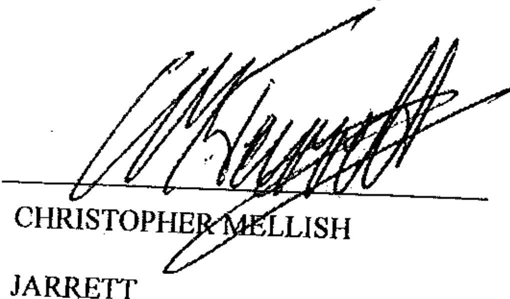
do hereby make oath and say:

1. I am the above-named fourth applicant. The facts to which I depose are within my own knowledge, and are true and correct. The submissions I advance are on the advice of my legal representatives.

2. I have read the notice of motion and founding affidavit by Luke Munyandu Tembani, the first applicant in this matter supporting our application for leave to intervene as co-applicants in the main application.

3. I confirm all references in it to me, and that he is duly authorised to act on my behalf in this matter.

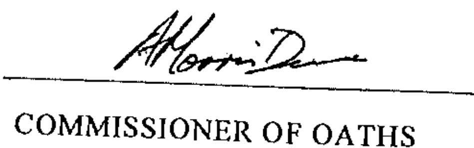
4. For the reasons and on the grounds set out in Mr Tembani's affidavit, I ask that the relief sought in the intervention application and in the main application be granted.



CHRISTOPHER MELLISH

JARRETT

Signed and sworn before me at BULAWAYO on this 23rd day of JULY 2015 after the deponent declared that he is familiar with the contents of this statement and regards the prescribed oath as binding on his conscience and has no objection against taking the said prescribed oath.



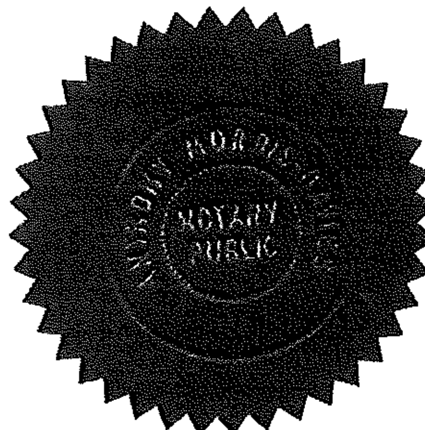
COMMISSIONER OF OATHS

FULL NAMES:

CAPACITY:

ADDRESS:

ANTHONY MORRIS-DAVIES
LEGAL PRACTITIONER / NOTARY PUBLIC
EX OFFICIO: COMMISSIONER OF OATHS
No. 1, 12TH AVENUE, BULAWAYO
ZIMBABWE



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no 20382/2015

In the intervention application between:

LUKE MUNYANDU TEMBANI	First applicant
BENJAMIN JOHN FREETH	Second applicant
RICHARD THOMAS ETHEREDGE	Third applicant
CHRISTOPHER MELLISH JARRET	Fourth applicant
TENGWE ESTATES (PVT) LTD	Fifth applicant
FRANCE FARM (PVT) LTD	Sixth applicant

and

LAW SOCIETY OF SOUTH AFRICA	First respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fourth respondent

In re:

LAW SOCIETY OF SOUTH AFRICA	Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Third respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

ANDREW JOHN CECIL KOCKOTT

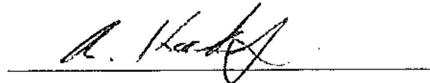
do hereby make oath and say:

1. I am a director, shareholder and duly authorised representative of Tengwe Estates (Pvt) Ltd, the above-named fifth applicant. A copy of the company resolution to this effect is attached as annexure "AJC1". The facts to which I depose are within my own knowledge, and are true and correct. The submissions I advance are on the advice of my legal representatives.

2. I have read the notice of motion and founding affidavit by Luke Munyandu Tembani, the first applicant in this matter, supporting our application for leave to intervene as co-applicants in the main application.

3. I confirm all references in it to me, and that he is duly authorised to act on my behalf in this matter.

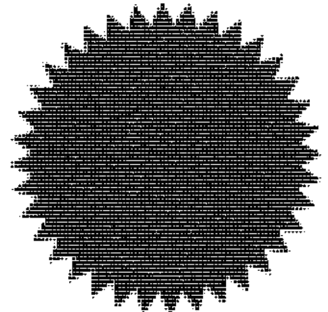
4. For the reasons and on the grounds set out in Mr Tembani's affidavit, I ask that the relief sought in the intervention application and in the main application be granted.



ANDREW JOHN CECIL KOCKOTT

Signed and sworn before me at HARARE on this 24TH day of JULY 2015 after the deponent declared that he is familiar with the contents of this statement and regards the prescribed oath as binding on his conscience and has no objection against taking the said prescribed oath.

COMMISSIONER OF OATHS



FULL NAMES: YEUKAI GUMBO

CAPACITY: NOTARY PUBLIC

ADDRESS: 11 PEEBLES ROAD, EASTLEA, HARARE

"AJC 1"

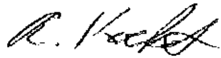
EXTRACT FROM THE MINUTES OF A MEETING OF THE DIRECTORS OF TENGWE ESTATES (PVT) LTD ("the Company") HELD AT HARARE ON THE 23rd DAY OF JULY 2015

RESOLVED THAT –

1. The Company shall apply for leave to intervene as a co-applicant in the court application filed by the Law Society of South Africa against the President of the Republic of South Africa and two others, in the High Court of South Africa, Gauteng Division, Pretoria, under case number 20382/2015.

2. That Andrew John Cecil Kockott is authorised to sign all necessary documentation on behalf of the Company and generally to do whatever may be necessary and or desirable to give effect to 1 above.

Certified a True Extract from the Minutes of the Meeting



Chairman of the Meeting

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no 20382/2015

In the intervention application between:

LUKE MUNYANDU TEMBANI	First applicant
BENJAMIN JOHN FREETH	Second applicant
RICHARD THOMAS ETHEREDGE	Third applicant
CHRISTOPHER MELLISH JARRETT	Fourth applicant
TENGWE ESTATE (PVT) LTD	Fifth applicant
FRANCE FARM (PVT) LTD	Sixth applicant

and

LAW SOCIETY OF SOUTH AFRICA	First respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Fourth respondent

In re:

LAW SOCIETY OF SOUTH AFRICA	Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Third respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

LAWRENCE BROWNLEE CUMMING

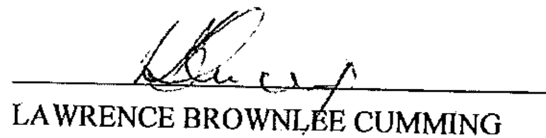
do hereby make oath and say:

1. I am a director, shareholder and duly authorised representative of France Farm (Pvt) Ltd, the above-named sixth applicant. A copy of the company resolution to this effect is attached as annexure "LBC1". The facts to which I depose are within my own knowledge, and are true and correct. The submissions I advance are on the advice of my legal representatives.

2. I have read the notice of motion and founding affidavit by Luke Munyandu Tembani, the first applicant in this matter, supporting our application for leave to intervene as co-applicants in the main application.

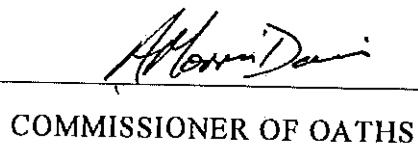
3. I confirm all references in it to me, and that he is duly authorised to act on my behalf in this matter.

4. For the reasons and on the grounds set out in Mr Tembani's affidavit, I ask that the relief sought in the intervention application and in the main application be granted.



LAWRENCE BROWNLEE CUMMING

Signed and sworn before me at BULAWAYO on this 23RD day of JULY 2015 after the deponent declared that he is familiar with the contents of this statement and regards the prescribed oath as binding on his conscience and has no objection against taking the said prescribed oath.



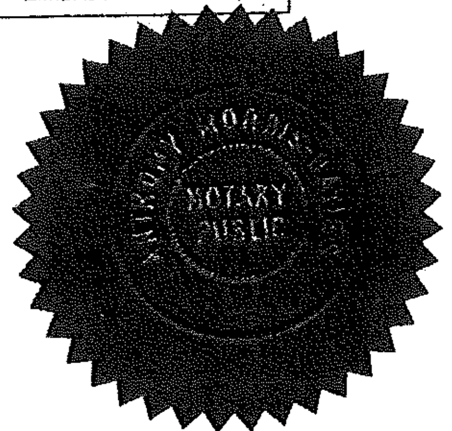
COMMISSIONER OF OATHS

FULL NAMES:

CAPACITY:

ADDRESS:

ANTHONY MORRIS-DAVIES
LEGAL PRACTITIONER / NOTARY PUBLIC
EX OFFICIO: COMMISSIONER OF OATHS
No. 1, 12TH AVENUE, BULAWAYO
ZIMBABWE



"LBC 1"

EXTRACT FROM THE MINUTES OF A MEETING OF THE DIRECTORS OF FRANCE FARM (PVT) LTD ("the Company") HELD AT VICTORIA FALLS ON THE TWENTY FIRST DAY OF JULY 2015

RESOLVED THAT –

1. The Company shall apply for leave to intervene as a co-applicant in the court application filed by the Law Society of South Africa against the President of the Republic of South Africa and two others, in the High Court of South Africa, Gauteng Division, Pretoria, under case number 20382/2015.

2. That Lawrence Brownlee Cumming is authorised to sign all necessary documentation on behalf of the Company and generally to do whatever may be necessary and or desirable to give effect to 1 above.

Certified a True Extract from the Minutes of the Meeting

Chalrman of the Meeting

OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

Office of the Registrar of the High Court Of South Africa, Gauteng Division, Pretoria
Private Bag/Privaatsak X67, Pretoria, 0001
Tel No: (012) 315 7429 Fax No: 012 3151995

APPLICATION FOR UNOPPOSED DATE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2015 -07- 24
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

CASE NUMBER:	20382/2015
LAW FRIM	Hurter Spies Inc.
NAME OF PARTY ENROLLING	Alet Nys
DATE ALLOCATED	08/09/2015
ROLL NUMBER	35

PLEASE NOTE WITHOUT THIS FORM YOUR MATTER MIGHT NOT BE PLACED ON THE FINAL ROLL