IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

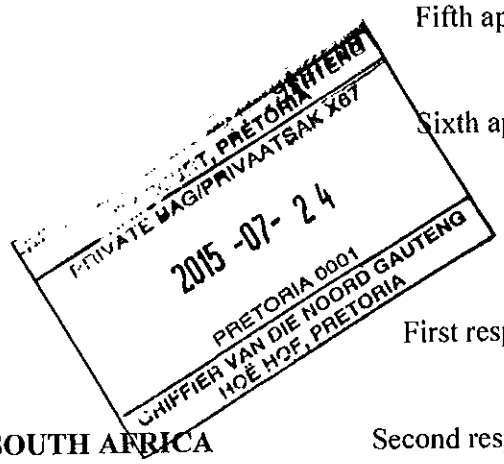
Case no 20382/2015

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

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NOTICE OF MOTION

TAKE NOTICE THAT on **8 SEPTEMBER 2015** at 10:00 or as soon as possible thereafter when counsel may heard, the interveners shall apply for an order in the following terms:

1. granting leave to the interveners to intervene as second to seventh applicants;

2. directing that the affidavit of Luke Munyandu Tembani and its annexure be admitted as founding papers filed on behalf of the second to seventh applicants; and

3. directing the respondents to pay the costs of this application, only in the event of their opposition, jointly and severally as regards such respondents as may oppose same.

TAKE NOTICE FURTHER THAT the affidavit of LUKE MUNYANDU TEMBANI and its annexure, together with confirmatory affidavits on behalf of the further interveners, will be used in support of this application.

TAKE NOTICE FURTHER THAT if you intend opposing this application you are required:

(a) to notify the interveners' attorneys, in writing, no later than five days after delivery hereof; and

(b) within 15 days thereafter to deliver any answering affidavits you may desire in answer to the allegations by the interveners.

AND further that you are required to appoint in the notification referred to in (a) above an address referred to in Rule 6(5)(b) of the Uniform Rules of Court at which you will accept notice and service of all documents in these proceedings (preferably an email address).

TAKE NOTICE FURTHER THAT if no such notice of intention to oppose be given, the application will be set down for hearing on a date and at a time to be arranged with the Registrar of the above Honourable Court, not being less than 10 days after service of this notice of motion.

SIGNED AT PRETORIA ON 24TH OF JULY 2015

HURTER SPIES INCORPORATED
Attorneys for 1st to 6th Applicant
1st Floor, AfriForum Building
Cnr D F Malan & Union Avenue
Kloofsig, Centurion
Tel: (012) 644 2676
Fax: (012) 644 1997
Ref: W D Spies/AF0007

TO: **THE REGISTRAR OF THE COURT**
PRETORIA

AND TO: **MOTHLE JOOMA SABDIA INC**

Attorneys for the 1st Respondent

Duncan Manor

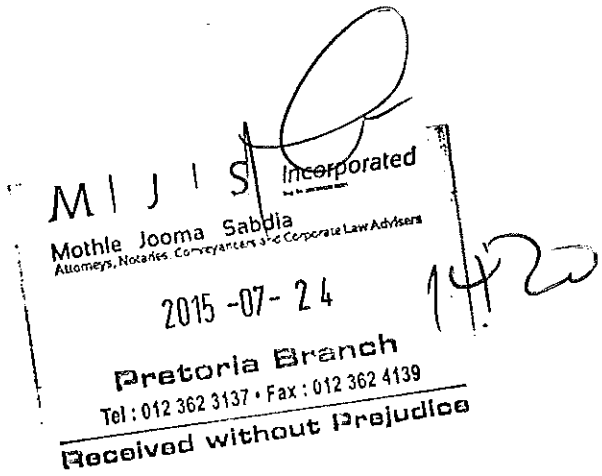
Cnr Jan Shoba and Brooks Street

Brooklyn

Pretoria

Tel: (012) 362 3137

Ref: T A Mothle/Louise/TAM3499



Received a copy hereof on the _____

Day of JULY 2015 at _____

_____

AND TO: **THE STATE ATTORNEYS OFFICE – PRETORIA**

Attorneys for 2nd , 3rd and 4th Respondent

316 Thabo Sehume Street

Pretoria

Ref: 1832/2015/Z220/js

Received a copy hereof on the _____

Day of JULY 2015 at _____

_____

IN THE HIGH COURT OF SOUTH AFRICA
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Case no 20382/2015

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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

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SUPPORTING AFFIDAVIT

I, the undersigned,

LUKE MUNYANDU TEMBANI

do hereby make oath and state as follows:

1. I am a 78-year-old commercial farmer residing and working on the farm Minverwag, in the Nyazura District of Zimbabwe. I am a citizen of Zimbabwe, born and always resident there, and the first applicant in this intervention application.

2. The contents of this affidavit are, save where otherwise indicated or as may appear from the context, within my own knowledge. Where I make legal submissions I do so on advice by my legal representatives. I am authorised to depose to this affidavit and to bring this application on behalf of myself and each of the other applicants. Their confirmatory affidavits will be filed with this affidavit. As I shall explain below, this application is also brought in the public interest, and in the interests of SADC employees and appointees and South African and other citizens of SADC member States – most of whom are unable to litigate themselves.

3. I depose to this affidavit in support of our application to intervene as further applicants in the main application instituted by the Law Society of South Africa (LSSA). The main application concerns the constitutionality of the President of the Republic of South Africa's participation in the suspension of the SADC Tribunal, and his signing of the 2014 Protocol on the SADC Tribunal. As I shall show, the interveners have a direct and substantial legal interest in the relief sought. Some of us have also been directly involved in previous proceedings impugning conduct

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culminating in the SADC Tribunal's undoing. For the reasons set out below, we submit that terminating the Tribunal's jurisdiction over individuals

- is contrary to the SADC Treaty itself;
- retrospectively affects vested rights; and
- is irrational, arbitrary and *mala fide*.

In participating in the effective demise of the Tribunal – which occurred at the instance of President Mugabe and under his chairmanship of SADC, after the Tribunal had delivered a series of important judgments against Zimbabwe – President Zuma acted contrary to the South African Constitution in the respects detailed below.

4. I structure this affidavit as follows

(a) First, in an introductory section, I explain the relief sought in the main application, and the context in which it arises.

(b) Second, I describe the interveners and demonstrate their direct and substantial interest in the main application.

(c) Third, I identify the submissions the interveners intend to advance in the main application.

(d) Fourth, I conclude by asking for what I am advised is the appropriate order.

A. <u>Introduction</u>

5. As mentioned, the main application involves the constitutionality of the President's conduct in participating in what amounts to the practical dissolution of an essential element of the *trias politicas* created by the SADC Treaty: the SADC Tribunal, the judicial arm of SADC. The decision impugned by the LSSA in the main application

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purports to restrict the SADC Tribunal's jurisdiction to disputes between member States of SADC. Thus, despite human rights being a *Grundnorm* of the SADC Treaty, only State parties can challenge the conduct of States and SADC organs before the Tribunal. There is no lawful basis for the conduct of the President in conniving (with the other Heads of State) at a result which exclusively permits States to approach the Tribunal. This eviscerates the Tribunal's vital original jurisdiction protecting the human rights of some 55 million individual inhabitants of South Africa, and over 250 million other individuals across the region.

6. Indeed, no rationale for radically curtailing the Tribunal's jurisdiction was advanced, whether at the time that jurisdiction was destroyed or in subsequent proceedings I shall recount. This is unsurprising, because

- SADC decisions are made by consensus between member States – thus SADC conduct cannot be impugned by States, because they are per definition the result of State parties' consent;
- States are not the right-bearers of human rights – instead, it is the individuals whose access have purportedly been excluded who are the right-bearers;
- the SADC Tribunal's history demonstrates that it is not inter-state disputes which is the Tribunal's *raison d'être* – instead, as is to be expected, it is disputes between individuals and States (or between individuals and SADC itself) which comprised the Tribunal's caseload;
- there is therefore only a very limited potential scope for any disputes arising which would fall within the reduced jurisdiction of the Tribunal.

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- there is therefore only a very limited potential scope for any disputes arising which would fall within the reduced jurisdiction of the Tribunal.

7. The main application by the LSSA accordingly impugns the constitutionality of the President's participation in a decision intended to oust the Tribunal's jurisdiction. It does so on the basis that ousting the jurisdiction of the Tribunal violates the right of access to justice and human rights, that the decision was taken without a prior consultative process and without providing any reasons and information in relation to the decision, and that the elimination of all recourse to the region's most important human rights and international law protector is arbitrary, not in good faith, irrational and unreasonable and contrary to the rule of law and the principle of legality.

8. The interveners seek to intervene because of their own interest, their own basis to act in the public interest, and the evidence and submissions which they wish to place before the Court. In material respects their evidence and submissions extend beyond the ambit of that advanced by the LSSA. The interveners' own circumstances and previous litigation experience demonstrate that the remarkable inability to provide reasons and information relating to the impugned decision support the bases on which the interveners intend to challenge the impugned conduct. In short, the conduct in which President Zuma participated constitutes the latest instalment in an irrational and *mala fide* exercise of public power – contrary to the rule of law. I am advised that the Constitutional Court confirmed that such conduct is justiciable, and that the basis summarised above constitutes a proper basis for courts' intervention in executive action. I stress the latter, because it is apparent from the answering affidavit now filed by the State respondents that they contend that the matters raised by the main application are a matter for Parliament, not the courts.

LMT

9. The Constitutional Court, moreover, has explicitly recognised the central role of the SADC Tribunal in ensuring the realisation of the SADC Treaty's commitment to human rights, democracy and the rule of law – especially through exercising its jurisdiction in "human rights related complaints particularly [instituted] by citizens against their States". As I shall show in what follows, the interveners are not only SADC citizens who have successfully litigated human rights cases before the SADC Tribunal, and whose vested remedies are enforceable before the Tribunal. It is also the interveners' litigation in domestic courts which had culminated in the Constitutional Court's judgment emphasising the importance of the SADC Tribunal's jurisdiction in individual complaints. It is this jurisdiction which has purportedly been ousted by the impugned decision.

B. <u>The interveners and their direct and substantial interest</u>

10. As mentioned, I am the first intervener. My details are set out in the first paragraphs of this affidavit. I have been the successful applicant before the SADC Tribunal in *Tembani v Republic of Zimbabwe* (SADC (T) 07/2008) [2009] SADCT 3 (14 August 2009).

11. I have subsequently also been a co-applicant in proceedings instituted before the SADC Tribunal impugning the purported 2010 and 2011 suspension of the SADC Tribunal. However, a practical consequence of the impugned suspension was the Tribunal's inability to convene to adjudicate the validity of its own suspension. Significantly, the SADC Summit did nothing to enable the Tribunal to determine the lawfulness of the Summit's decision to interfere with the Tribunal's jurisdiction. For

this reason a further application was instituted before the African Commission to consider the validity of the ouster of the Tribunal's jurisdiction. I was again a co-applicant in that matter. The outcome of that application was a decision by the African Commission holding that the ouster did not constitute a cause of action before the Commission under the African Charter, because (it was of the view) the relevant provisions of the Charter contemplates access to justice before domestic (as opposed to international) courts. Whether the African Commission was correct in so holding has been a matter of controversy, but (I am advised) is not further relevant to this application. It was exercising its own pre-curial jurisdiction, and it left unaddressed important matters which the interveners raise before this Court. Correctly the State respondents have placed no reliance on the ruling by the African Commission.

12. For present purposes the significance of the aforesaid proceedings before the Tribunal and the African Commission is that my standing to litigate on the subject-matter of the main application was recognised.

13. The same applies to the second intervener, my fellow co-applicant in the aforesaid litigation before the African Commission. He is Benjamin John Freeth, a former commercial farmer of Zimbabwe and actively engaged in defending the SADC Tribunal's jurisdiction ever since it was targeted by Zimbabwe. Mr Freeth is the son-in-law of the late Mike Campbell, the lead litigant in *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008).

14. It is the *Mike Campbell* judgment which triggered firstly Zimbabwe's contempt for and backlash against the Tribunal, thereafter the Tribunal's referral of Zimbabwe's

violation of its orders to the SADC Summit, and ultimately the SADC Summit's action against the Tribunal at the instance of Zimbabwe – instead of sanctioning Zimbabwe, as the SADC Treaty contemplates. The Tribunal's protective orders in favour of litigants like Mr Campbell were not only repudiated by Zimbabwe, Zimbabwe also retaliated against *inter alios* Mr Campbell. He, like others (including Mr Freeth himself), were targeted by the Zimbabwean authorities, and severely assaulted. Mr Campbell died of the injuries thus inflicted. Already by the time the South African litigation culminating in the judgment in *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) was argued before the Constitutional Court, Mr Campbell – who was a party to the litigation – was no longer able to participate in it.

15. Accordingly other litigants had to see through the litigation resulting in the Constitutional Court's important precedent recognising the Tribunal's human rights jurisdiction exercisable at the instance of individual litigants. One of them was Richard Thomas Etheredge, the third intervener, a former commercial farmer of Stockdale Farm, Chegutu District. Since his forceful eviction from his farm in 2009 Mr Etheredge resides in Dandaro, Harare. Mr Fick himself, who was the lead litigant through three courts in *Zimbabwe v Fick*, cannot participate in the current proceedings for fear of reprisal.

16. It is an unfortunate feature of litigation by and on behalf of Zimbabwean proponents of the SADC Tribunal that litigants' safety and security are under threat. Hence the need for affording representative standing to the interveners as contemplated by section 38(b) of the Constitution. Many other beneficiaries of the Tribunal's orders

(*inter alios* the twelve litigants in *Gondo v Government of Zimbabwe* SADCT case no. 05-2008) are unable to pursue litigation to protect their vested legal interest in enforcing orders by the Tribunal. The *Gondo* litigants were victims of torture by Zimbabwe. They, too, have vested rights exigible before the SADC Tribunal.

17. It may be noted that successful individual claimants before the Tribunal have included those from member States besides Zimbabwe. In *Bach's Transport (Pty) Ltd v Democratic Republic of Congo* (SADC (T) 14/2008) [2010] SADCT 6 the Tribunal awarded damages in a sum of US$1.988 million together with 10% interest from October 2006 to date of award (11 June 2010), with a punitive costs order, against the Democratic Republic of Congo. This was in circumstances where the courts of the DRC had clearly failed the claimant; it had been required, on the evidence accepted by the Tribunal, to pay bribes to the domestic judges (which it refused to do). This again illustrates how vital the Tribunal has been in securing access to justice for individuals.

18. The fourth to sixth interveners are Christopher Mellish Jarret, Tengwe Estate (Pvt) Ltd, and France Farm (Pvt) Ltd. Mr Jarret is a commercial farmer in Zimbabwe, and the juristic persons are corporate entities through which commercial farming is conducted in Zimbabwe. All three of them were already expropriated by the time of the *Campbell* litigation before the SADC Tribunal. The Tribunal accordingly ordered that they be paid reasonable compensation to be quantified in further proceedings before the Tribunal in the absence of an agreement by the parties. Because Zimbabwe repudiated the Tribunal's order in *Campbell*, quantification by the Tribunal itself became necessary. But by the time this was sought to be obtained, access to the

Tribunal had been ousted temporarily at the instance of Zimbabwe. The impugned decision purports to make the prior temporary ouster permanent. It patently flouts the rights which have already vested in those held by the Tribunal to be entitled to reasonable compensation.

19. What this description of the interveners shows is that we have all litigated before or in respect of the SADC Tribunal. Some of us have challenged Zimbabwe's unlawful conduct and its subsequent attack on the Tribunal culminating in the decision impugned in the main application. Others have vested legal interests in remedies exclusively exigible before the Tribunal. All of us have a legal interest in challenging the conduct of heads of State before their domestic courts intended to oust the jurisdiction of the judicial arm of SADC. We do so in our own interest, in the interests of others who are unable to do so, in the interests of SADC employees and appointees (who have no recourse to any other forum as regards their disputes), in the interest of beneficiaries of SADC Tribunal judgments and other potential litigants before the SADC Tribunal, and in the interest of the public in South Africa and the rest of SADC.

C. <u>The applicants' submissions should intervention succeed</u>

20. Should the application for intervention succeed, the interveners intend to support the relief sought by the LSSA (but also asking for a related order that the President be directed to take all such steps as may be necessary to reverse his impugned action). The LSSA's case is based on access to justice, prior consultation and the right to information and reasons. The interveners intend to demonstrate the

unconstitutionality of the impugned decision on the basis of the rule of law, rationality and bad faith.

21. These constitutional causes of action have formed a substantial part of some of the interveners' aforesaid litigation challenging the lawfulness of the purported abrogation of the Tribunal's jurisdiction. They do not yet form part of the challenge before this Court. Even the intended *amicus* intervention is restricted to the right of access to court. While the interveners support this basis for impugning the decision (having indeed invoked it before the African Commission), the interveners' position is that the retrospective and retrogressive ouster of the Tribunal's human rights jurisdiction bears on the rationality and *bona fides* – and thus legality – of the impugned decisions. Accordingly the interveners bring an important new legal dimension to bear on the question for consideration in the main application. This perspective will assist the Court in adjudicating the matter, and ensure that the relevant factual and legal context is ventilated.

22. The intended intervention is not, however, likely to introduce any material factual controversy. This is because the interveners intend to demonstrate that the impugned decision is unconstitutional with reference to our prior litigation, the facts set out in the pleadings in those cases, and the judgments resulting from the litigation. The only further evidence which the interveners seek to introduce to establish our cause of action is this affidavit and the communication to the African Commission (marked "A"). The factual material contained herein is uncontroversial, and has been available for full ventilation in previous proceedings. Indeed, the Government of the Republic of South Africa and the President himself elected to abide the outcome of

the previous proceedings, and did not contest the factual accuracy of the previous affidavits. I have no doubt that they would not now wish to be seen to act inconsistently with the stance thus formally adopted by the South African Government before the bodies of the African Union. In this context no *bona fide* dispute of fact can conceivably arise.

23. This is further confirmed by the answering affidavit filed on 17 July 2015. It is apparent that the State respondents focus on legal contentions. They remarkably contend that the main application is brought both too late, and prematurely. They also seek to take a point of non-joinder in relation to South Africa's High Commissioner to Namibia – although he is described as "the President's representative at the relevant Summit" (para 22, emphasis added).

24. I am advised that neither the "unreasonable delay" nor the simultaneous contention of prematurity needs be addressed at length in this affidavit. I would however record that neither forms a basis for the intervention not to be allowed. As regards the suggestion of prematurity, this is clearly misconceived. The central issue raised by the LSSA and the interveners is the legality of the President's conduct. That is a matter wholly and exclusively for the courts. Whether or not Parliament follows (as in practical terms is inevitable) the Executive is not material to the enquiry as to whether what the President did complies with the Constitution. The argument – for it is that – advanced laboriously in paragraphs 30 to 45 of the State respondents' answering affidavit now filed is misconceived, as will further be demonstrated more appropriately in argument.

25. As regards the suggestion of unreasonable delay, this disregards several realities insofar as the State respondents may seek now to extend it to the interveners. The first is that the critical conduct by the President only occurred on August 2014. The second is that I and several of the other interveners were only made aware on 17 July 2015 that the State respondents would oppose the main application. As indicated, the Government of South Africa had chosen to abide the prior related proceedings. The third is that the interveners have been stripped of their assets by the very conduct held by the Tribunal to be unlawful. We were first able to consult (through some of the interveners) with South African attorneys in Pretoria on 21 July 2015. The fourth is that the interveners have acted with great speed since then in finalising this intervention application.

26. There can be no prejudice to the respondents should the interveners be permitted to participate in proceedings affecting them. As has been noted, this intervention application has been brought within days of the filing of the State respondents' answering affidavit in the main application being lodged. No imminent hearing is delayed or jeopardised.

D. <u>Conclusion</u>

27. For the reasons set out above, I ask that the interveners be granted leave to intervene as second to seventh applicants, and that this affidavit and its annexure be admitted as founding papers filed on behalf of the second to seventh applicants.

28. The interveners seek costs only in the event of opposition by such parties as may oppose the intervention application, to be paid jointly and severally the one paying the others to be absolved. I ask that such costs order include the costs of two counsel. I am advised that this is appropriate in the light of the importance of the matter.

LUKE MUNYANDU TEMBANI

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, that he has no objection to the taking of the prescribed oath and that he considers this oath to be binding on his conscience.

SIGNED AND SWORN TO BEFORE ME AT Centurion ON THIS 21st DAY OF JULY 2015.

COMMISSIONER OF OATHS

Full names: **Hendrik George van der Hoven**
Capacity: Kommissaris van Ede / Commissioner of Oaths
Ex Officio: Admitted Attorney RSA
Business address: Northstraat 94
Rietondale
Pretoria
Area: 0084
(012) 644 4393

"A"
1

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

Communication 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

NOTICE OF COMMUNICATION

2

TAKE NOTICE THAT the applicants petition the Secretary of the African Commission on Human and Peoples' Rights to receive this communication in terms of Article 55 of the African Charter.

THE APPLICANTS request the African Commission to refer the communication to the African Court for a declaration in the following terms:

(a) The purported decisions of 16-17 August 2010 and 20 May 2011 by the Summit of the Southern African Development Community ("SADC") to suspend the functions of the SADC Tribunal infringes the African Charter, the SADC Treaty and principles of international law binding on the third to sixteenth respondents.

(b) The respondents are directed to lift, with immediate effect, the purported suspension of the SADC Tribunal's functions, and to do all such things necessary in order to support and facilitate the Tribunal and its functions, including:

(i) re-appointing the members of the SADC Tribunal whose terms of office were allowed to expire pursuant to the decision to suspend the Tribunal;

(ii) providing the necessary funding for the Tribunal's continued operations;

(iii) refraining from taking any measure likely to jeopardise the functioning of the SADC Tribunal; and

(iv) abstaining from any measure likely to detract from the independence, impartiality, effectiveness, accessibility and status of the SADC Tribunal.

(c) The respondents are directed to give effect to the rulings by the SADC Tribunal, including the orders referred to the Summit by the Tribunal.

(d) The respondents are directed to implement the recommendations made in the Final Report on the Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal, dated 6 March 2011.

3

TAKE NOTICE FURTHER that the attached affidavit of LUKE MUNYANDU TEMBANI, and annexures thereto, is relied upon in support of the communication.

TAKE FURTHER NOTICE that the applicants appoint Mr Norman Tjombe, whose particulars are set out below, as their authorised representative to whom all communication and correspondence in this matter is to be addressed.

DATED AT WINDHOEK ON THIS 22ND DAY OF JULY 2011

NORMAN TJOMBE LAW FIRM
At The Village
18 Liliencron Street
Windhoek
Namibia
Tel: +26461308841
Fax: +26488613678
Email: normantjombe@iway.na
(Per: Mr Norman Tjombe)

To: **THE SECRETARY**
The African Commission on Human and Peoples' Rights
P O Box 673, Banjul, The Gambia
Tel: 220 4410505 / 4410506
Fax: 220 4410504

4

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

Case no:

LUKE MUNYANDU TEMBANI	First applicant
BENJAMIN JOHN FREETH	Second applicant

and

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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

FOUNDING AFFIDAVIT

I the undersigned

LUKE MUNYANDU TEMBANI

do hereby make oath and state:

A. Introduction

1. I am a 74-year-old citizen of Zimbabwe, previously resident at the Remainder of Minverwag of Clare Estate Ranch, in the Nyazura district of Zimbabwe. I acquired registered title in 1985. I was one of the first indigenous farmers of Zimbabwe permitted to acquire title to agricultural land outside so-called tribal trust lands. I was a successful large-scale commercial farmer, investing considerable resources in the property, improving employees' housing and founding and personally funding a first primary school (for 320 children living on the farm and the surrounding area), a church hall, irrigation works and numerous other farming facilities.

2. I have been deprived of my title to the farm, and forced to leave it, consequent upon executive action by the government of Zimbabwe. This is detailed in the award by the South African Development Community (SADC) Tribunal, upholding my contention that the deprivation was in conflict with Zimbabwe's Treaty obligations and hence in violation of international law. I attach the award, marked "A".

3. As has been the case with other awards handed down by the Tribunal against Zimbabwe, the Government of Zimbabwe has defied it. I attach in this regard awards in favour of Messrs Gondo and others, marked "B", in respect of proceedings lodged on their behalf before the Tribunal and what have been termed the Campbell

LMT

applicants (being the late William Michael Campbell, a private company of which he was a director and which is the second applicant herein, and 75 other famers), marked "C". A series of further applications had to be made to the Tribunal, seeking a referral of Zimbabwe's defiance to the SADC Summit for measures to be taken against Zimbabwe as a SADC member State. These were also granted, but similarly defied. The details in these respects appear from a last application instituted by me and the second applicant (as well as the late William Michael Campbell, who died a week after deposing to his affidavit as a consequence of injuries sustained by him at the hands of land invaders in 2009). I attach a copy marked "D".

B. <u>Factual background</u>

4. The latter application ("Annexure D") sets out measures adopted by the SADC Summit which had as their effect the disabling of the SADC Tribunal from functioning. I confirm the factual allegations in the founding affidavit and supporting affidavits.

5. Annexure D sought to address the continuing situation created by the Summit decision of 16-17 August 2010 ("the first decision"), itself attached as an annexure to Annexure D. It sought to obtain from the Tribunal (of which only two judges remained members following the first decision) a declaration *inter alia* that the Summit was bound by the provisions listed in the notice of motion in Annexure D to support and facilitate the continued functioning of the Tribunal. The Tribunal however has not convened and now cannot convene, to deal with these matters by virtue of a further decision ("the second decision") by the Summit on 20 May 2011.

6. I attach a copy of the second decision, marked "E". I draw attention to paragraphs 7 and 8 thereof, the effect of which is to perpetuate the indefinite paralysis of the Tribunal by failing *inter alia* to ensure appointments of judges to it and "reiterat[ing] the moratorium on receiving any new cases or hearings of any cases by the Tribunal until the SADC Protocol on the Tribunal has been reviewed and approved" (my emphasis).

7. The second decision patently misrepresents the terms of the first as regards the words I have emphasised. These constituted no part of the earlier decision, which had left open enforcement applications such as those I have described, ancillary applications to matters already heard (such as an application for the revalorisation of damages awards arising from assaults by Zimbabwean security forces, and the quantification of damages arising from land seizures) and indeed any other pending application.

8. The second decision moreover gives no proper regard to the fact that the rationale for the first decision was a review of the functioning of the SADC Tribunal – which had been completed and the report delivered to the Summit prior to it taking the second decision. I attach marked "F" a copy of the final report by independent expert international consultants who had been engaged for the purpose, and who had conducted an extensive and transparent process before arriving at their conclusions. In short, the report made positive findings on the Tribunal and its existing role and functioning under the SADC Treaty and Protocol.

9. As pointed out in Annexure D, the first decision itself was an extraordinary one for the Summit to have taken. Instead of taking steps under the Treaty against Zimbabwe for its defiance of the Tribunal's awards, as was recommended by the Tribunal's reference, the Summit chose instead both to disable the Tribunal and to create an effective investigative appeal against it. The affront to the rule of law, the explicit division of powers created under the Treaty and Protocol and undermining of the final and binding nature of the Tribunal's decisions (as Article 16(5) of the Treaty expressly provides) is manifest.

10. The second decision moreover is significantly at odds with the recommendations by the Council of Ministers of Justice. I attach a copy of the minute of their meeting, marked "G". It would be noted that the Ministers of Justice – appointed of course by virtue of their legal backgrounds – unanimously accepted by clear implication the expert report, and confined their recommendations to proposed amendments to the Treaty and Protocol. Nowhere did they propound perpetuating the paralysis of the Tribunal, or doubt the correctness of the report.

11. The first and second decisions have given rise to wide-spread public condemnation. Merely by way of illustration I attach statements issued by the SADC lawyers' association and an important statement issued by the four justices of the Tribunal whose terms of office were allowed to elapse, thereby preventing the Tribunal from functioning. These are marked "H" and "I" respectively.

C. **Legal submissions**

12. For the reasons set out below, I submit that the suspension of the SADC Tribunal violates the African Charter, the SADC Treaty and Protocol and that the decision to do so is irrational, arbitrary, motivated by extraneous considerations and is also otherwise unlawful.

(1) African Charter

13. The termination of the functions of the regional international court for the SADC region (and the manner in which this was done) violates numerous provisions of the African Charter and some of the most fundamental principles of the OAU Charter, such as "freedom, equality, justice and dignity". In particular, it violates the clear provisions of Articles 7 and 26 of the Banjul Charter.

14. Article 7 of the African Charter provides

> "1. Every individual shall have the right to have his cause heard. This comprises:
>
> (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
>
> (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
>
> (c) the right to defence, including the right to be defended by counsel of his choice;
>
> (d) the right to be tried within a reasonable time by an impartial court or tribunal.
>
> 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was

committed. Punishment is personal and can be imposed only on the offender."

15. Article 26 provides:

"States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

16. By virtue of the aforegoing I say that the said decisions and actions of the SADC Summit, and thereby of each member State of SADC in assenting thereto, and the consequential failures to ensure that the Tribunal continues to function, constitute a violation of the rights of the applicants under the Charter, as well as of the provisions of the SADC Treaty and Protocol specified in Annexure D.

(2) <u>SADC Treaty</u>

17. As is set out in Annexure D, the decision to suspend an integral part of the *trias politicas* established by the SADC Treaty – its highest adjudicative instrument is itself a violation of Articles 4 and 6 of the SADC Treaty.

18. Article 4 of the Treaty peremptorily requires SADC and its member States to

"act in accordance with the following principles:

. . .

(c) human rights, democracy and the rule of law

. . .

(c) peaceful settlement of disputes."

19. By suspending the Tribunal, the SADC Summit (and through it each member State) has not only disabled the forum before which a remedy for the violation of human rights may be sought. It has also abrogated an essential element of the rule of law: an independent judiciary. This violates not only SADC law, but also the law of the African Union and other relevant and binding instruments of international law, as is confirmed by *inter alia*

- *Lawyers for Human Rights v Swaziland* Comm. 251/2002, 18th ACHPR AAR Annex III (2004-2005);
- the Conclusions of the Second Committee of the International Congress of Jurists, New Delhi, India, 1959; and
- the African Conference on the Rule of Law ("The Law of Lagos").

20. At the same time the entrenched SADC principle of peaceful dispute resolution is infringed. This is because the Tribunal functions also as the forum for the resolution of disputes between States. Thus Article 4(e) of the Treaty has been violated too.

21. Similarly Article 6, which contains undertakings by member States to promote the objectives set out in Article 4 and to "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 this Treaty" (Article 6(1)) and to "co-operate with and assist institutions of SADC in the performance of their duties" (Article 6(6)). Instead of enabling the Tribunal and giving effect to its judgments, member States have sided with the violator, granting it effective immunity from the Tribunal's orders and allowing it to continue the measures held by the Tribunal to be in violation of

international law with impunity. Further, by suspending the Tribunal it has frustrated the achievement of the objectives of SADC.

(3) Otherwise unlawful

22. Finally, for reasons to be presented in legal argument (which the respondents respectfully request to be afforded an opportunity to present through our legal representatives), the decision of the response by the Council of Ministers and thereafter the SADC Summit is irregular, without a proper rational basis, constitutes the arbitrary exercise of executive power and is motivated by ulterior purposes and is in bad faith. I deal with each of these grounds in turn.

23. Firstly, numerous irregularities vitiate the impugned decision. It was, for instance, made without proper prior notice to the President of the Tribunal, who ordinarily participates in deliberations concerning the Tribunal. (H.E. Justice Pillay was provided with no more than 24 hours' notice, which is insufficient to enable him to travel from Mauritius, where he ordinarily resides, via South Africa to the meeting in Windhoek. Clearly this was intended to ensure his non-attendance. In this regard I refer to the public lecture by Justice Pillay delivered on 11 and 13 July 2011 at Johannesburg (which I attended) and Windhoek respectively, a copy of which is attached, marked "J". I would add that I ask each of the further grounds on which Justice Pillay and his two colleagues impugn the legality of the steps taken by Summit to procure the non-functioning of the Tribunal be regarded as incorporated herein.

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24. Secondly, the decision is wholly at odds with the analysis and recommendations of the independent expert advising on the functions, role and status of the Tribunal and its rulings. The independent expert report (annexure F) confirmed that the Tribunal's decisions were competent and requires to be given effect to. Instead of doing the latter, the Tribunal was suspended. This is an entirely irrational response.

25. Similarly, the Summit's decision to depart from the recommendations by the Ministers of Justice/Attorneys-General (at their meeting in Swakopmund, Namibia on 14-15 April 2011), who made "Recommendations Aimed at Improving the Legal Framework in which the Tribunal Operates" (annexure G) further demonstrates that the decision lacks a rational, *bona fide* basis. Significantly no reasons or explanation have been provided for the decision to do the contrary of what the Ministers of Justice/Attorneys-General have recommended.

26. The *volte face* strongly suggests that the Summit was motivated by ulterior purposes: instead of giving effect to the decision against a member State, it gave effect to the wishes of that member State to be absolved from its responsibilities as declared by the Tribunal. This was done retrospectively. It was done neither by amending the Treaty (as it itself provides for) nor by termination or suspension of Zimbabwe's membership. Rather, it was the Tribunal which was suspended - as if that could ever provide a remedy for the human rights violations it has pronounced upon, or vindicate the rule of law. The gross disparity in the decision by the Summit and the recommendations by the Ministers of Justice/Attorneys-General (and indeed the Tribunal itself in referring Zimbabwe's repudiation of its rulings to the Summit) demonstrates its arbitrariness and that the decision was made for ulterior purposes.

D. Exhaustion of domestic remedies

27. I and the other applicants have exhausted every other remedy open to us to achieve the enforcement of Zimbabwe's Charter, Treaty and other international law obligations arising from its actions against us, specified in Annexure D. We have proceeded to finality (as the Tribunal found) through the domestic courts of Zimbabwe. We have achieved what are in their terms final and binding awards from the SADC Tribunal.

28. In the case of the Campbell applicant, we have reverted to the Tribunal as regards Zimbabwe's defiance of its awards, and obtained a referral of such defiance by the Tribunal to the Summit. The Campbell applicants have also sought (as they were entitled to do in terms of the Protocol on the SADC Tribunal) to register the awards in the domestic courts of two SADC member States: South Africa and Zimbabwe.

29. In the case of South Africa, this application was granted by the High Court in Pretoria (and a subsequent attempt by Zimbabwe to have such order rescinded was dismissed by the High Court). In the case of the application to the High Court in Harare, Patel J (the judge allocated to the matter, despite the fact that he is a former Acting Attorney-General and thereby a member of the President Mugabe's cabinet) dismissed the Government of Zimbabwe's denial of the Tribunal's jurisdiction (after refusing counsel who had throughout acted for the applicants, both before the Zimbabwe courts and the Tribunal, admission to appear before him). He however upheld its contention that registration of the Tribunal award was "contrary to public policy", on

the basis that it held unlawful the land seizure programme which had been found to be valid under Zimbabwe's domestic law by the Supreme Court. (Each member of that court bar one - Justice Wilson Sandura, the most senior member – has received at least one confiscated farm by government allocation.) I am advised that the untenability of refusing to register the SADC award on this circular basis will be further address, if required, in legal argument. I attach copies of the respective High Court registration judgments, marked "K" and "L".

E. Exhaustion of (sub-)regional remedies

30. From the above it is also apparent that the applicants have exhausted any possible remedy as regards the issues raised by the relief sought from the Commission and the African Court. They have nowhere else to turn. Annexure D cannot and will not be enrolled because the Tribunal has been disabled. It is no longer quorate, and the necessary resources are not being provided to it by the Summit to function. This is underscored by what I have pointed out is the false contention, in terms of the second decision, that in preventing even pending matters from being heard, the Summit was "reiterate[ing] its first decision". Clearly this false assertion was included in an endeavour to disguise the radical further step now taken, which is to prevent the Tribunal from functioning at all. The deprivation in this way of accrued procedural rights with purported retroactive effect is a flagrant violation of the Charter.

31. As regards other litigants, both now and in the future, the deprivation of access to courts is equally serious. As pointed out in Annexure D, the cumulative effect of the

Summit's two decisions is to allow member States to violate their international human rights and other obligations, both under the Treaty and otherwise, with impugnity.

32. Moreover, the prospect now exists that conflicts which may arise between member States themselves will lack the crucial adjudicative system the Treaty created. As also pointed out in Annexure D, employees and appointees of SADC are deprived of any legal forum (except this Commission and the African Court) in which to vindicate their rights. The treatment of the four members of the Tribunal itself illustrates this.

F. Conclusion

33. For the reasons set out above, the applicants ask that this matter be considered by the Commission, and referred by it to the African Court, both as a matter of urgency. I do so on the grounds set out at some length in Annexure D, as amplified by this affidavit. I and the Campbell applicants, our workers and their families, have been forced off our land and forced to live in often appalling conditions in urban settlements. I myself have recently lost a young child in these conditions. We have lost our livelihoods and our health and safety are at risk. We have already been involved in litigation seeking to protect our rights for several years. We have no other forum to turn to – indeed no other institution is currently seized with the matter. Besides, the issues of violation of the African Charter by member States are, I am advised, inherently urgent and require to be addressed by the Commission and the Court expeditiously.

34. Finally, I accept that some of the States which have been cited as respondents have not ratified the Protocol on the African Court. Nevertheless, they have been cited in order to afford all SADC members – all of which are parties to the impugned Summit decisions – notice of the challenge to their decisions, and the opportunity to defend the challenge. Should they, despite unanimously supporting those decisions, now consider it desirable to dissociate themselves from defending it before the African Court (on the basis that they refuse to submit to the Court's jurisdiction) I ask that they so declare. Upon such declaration, to be made by such time and in such form as prescribed by the Commission, I ask that the matter proceed as against only those member States which have not thus declared (in addition to those which have ratified the Protocol). A failure to expressly declare their dissociation from any defence of their impugned decisions will constitute a submission to the jurisdiction of the Court, I am advised.

35. I accordingly ask for an order as set out in the attached notice.

LUKE MUNYANDU TEMBANI

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
ON THIS THE DAY OF 2011.

COMMISSIONER OF OATHS

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

CASE NO. SADC (T) 07/2008

IN THE MATTER BETWEEN

LUKE MUNYANDU TEMBANI — APPLICANT

AND

THE REPUBLIC OF ZIMBABWE — RESPONDENT

CORAM

H.E. JUSTICE A.G. PILLAY — President

H.E. JUSTICE I.J. MTAMBO SC — Member

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

H.E. JUSTICE DR. R. KAMBOVO — Member

H.E. DR. O.B. TSHOSA — Member

Applicant's Agents: J. Gauntlett SC
F. Pelser, Counsel

Respondent's Agents: P. Machaya, Deputy Attorney-General
N. Mutsonziwa

Hon. Justice M.C.C. Mkandawire — Registrar
Mr. D. Shivangulula — Court Clerk

JUDGMENT

Delivered by H. E. JUSTICE ARIRANGA G. PILLAY

1. BACKGROUND

This application involves the consideration of the issue as to whether section 38 of the Agricultural Finance Corporation Act (cap. 18:02) [the Act] of the Laws of Zimbabwe conforms with Articles 4(c) and 6(1) of the Treaty of the Southern African Development Community (the Treaty), which provide as follows:

ARTICLE 4:

> *"SADC and its Member States shall act in accordance with the following principles:*
>
> *(c) human rights, democracy and the rule of law."*

ARTICLE 6:

> *"(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 jeopardize the sustenance of its principles, objectives and the implementation of the provisions of this Treaty."*

We will also bear in mind sub-articles (4) and (5) of Article 6 which read as follows:

> *"(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".*

The Applicant is a registered owner of a farm of 1265 hectares known as the Remainder of Minverwag of Clare Estate Ranch in Nyazura District in the Republic of Zimbabwe. He and his family have resided on the farm since 1983.

To finance his farming activities, the Applicant borrowed various sums of money from a parastatal bank called the Agricultural Bank of Zimbabwe (ABZ) on the security of the farm. Each of the loan agreements included a standard clause 6 authorizing ABZ, if at any time any sum of money due in respect of an advance is unpaid, to enter upon and take possession of the whole or any part of the security. The clause read as follows:

> *"Should the borrower commit or be in breach of any of the terms or conditions of this agreement the Corporation specifically stipulates as provided in section 40 of the Act, that it shall have the right in terms of that section of the Act, after demand by registered letter addressed to the borrower at his last known address or to the address given by him in his application for this loan, and <u>without recourse to a court of law</u>, to enter upon the property hypothecated and to take possession*

thereof and sell and dispose of the same in whole or in part as the Corporation may determine, always in terms of and subject to the provisions of the Act" (the underlining is ours).

Clause 6 is based on the former section 40 of the Act which is now section 38 and which, in the relevant part, provides as follows:

"38 (2) The Corporation may, in the case of an advance in respect of which security is given, including any security by way of a notarial bond or note of hand, stipulate that it shall be a condition of the advance that if any advance in respect of which security has been given becomes repayable . . . the Corporation, in addition to the powers conferred . . . , shall be entitled, . . . after a period of ten days have elapsed since the posting of a registered letter of demand addressed to the borrower at his last known address or at the address given by him in his application for the advance, to enter upon and take possession of the whole or any part of the security concerned and to dispose of such security . . . ".

The section is itself anchored to section 16(7) (d) of the Constitution of the Respondent which reads as follows:

"(7) Nothing contained or done under the authority of any law shall be held to be in contravention of sub-section (1) to the extent that the law in question makes provision for the acquisition of any property or any interest or right therein in any

of the following cases . . . :

(d) As an incident of a contract, including a lease or mortgage, which has been agreed upon between the parties to the contract, or of a title deed to land fixed at the time of the grant or transfer thereof or at any other time with the consent of the owner of the land."

Subsection (1) of section 16 of the Constitution of the Respondent prohibits compulsory acquisition of property, except under the authority of the law in certain specified circumstances.

The Applicant was unable to liquidate his indebtedness to ABZ, whose exact amount from the record is unclear, and, therefore, his farm was attached in terms of section 38 of the Act. The farm was then sold. The Applicant sought to set aside the sale and so he applied to the High Court **(Luke Manyandu Thembani vs Eagle Estate Agents (Pty) Ltd and Others),** contending that the farm was sold at an unreasonably low price and that this was due to inadequate advertisement of the sale. He also questioned the constitutionality of the Act. It was submitted on his behalf, in paragraph 14 of the Heads of Arguments that the point about the constitutionality of the Act was *"decisive of this case and there is no need or discretion for the court to look any further"*, and then it was argued further in paragraph 15 as follows:

"However, if this court is not persuaded on that, it is respectfully submitted that the applicant has bona fide and legitimate grounds to dispute that:

(a) the Act; and

(b) the way in which it was administered in regard to himself and his property,

are consistent with all the requirements of the Constitution, and to request that if necessary this should be referred to the Supreme Court".

It was further contended on behalf of the Applicant in paragraphs 16 and 17 as follows:

"16 The Supreme Court is not the sole court that must have regard to the Constitution, but if any party requests that a question concerning the Bill of Rights be referred there by a lower court, the lower court must refer it unless the request is frivolous and vexatious.

17 Section 3 of the Constitution is totally explicit. It states that any law inconsistent with any provision of the Constitution is void, and not merely voidable, and that prevents any court from enforcing it".

After considering the issues before it, the learned Judge of the High Court granted the application, but concerning the constitutionality of section 38. it had this to say:

"What one has to consider as I said earlier on is the issue of whether or not the property was adequately advertised. If the property was adequately advertised, then in my view no issue would arise as the Supreme Court of this country has already decided on the issues touching the AFC sales".

What the High Court was saying here is that there would be no point in referring the question of the constitutionality of section 38 of the Act to the Supreme Court because that Court has already resolved the issue in its earlier decisions. One such case in which the Supreme Court made the position very clear is that of **Augustine Runesu Chizikani v Agricultural Finance Corporation Civil Appeal No. 567/94**,' in which it stated, per Gubbay, C.J., as he then was, as follows:

> *"The Appellant has overlooked the recent judgment of this court in the case of* ***Nyamukusa v Agricultural Finance Corporation*** *SC 174/94 which conclusively affirms the correctness of the decision of the court a quo. In that case the Court, after citing section 4(1), section 40(2) and section 40(2a) of the Act, went on to hold as follows:*
>
> > *It is noted that he (the Appellant) was signatory to the agreement which gave powers to the Respondent to act in the manner it did. My reading of section 40(2) and (2a) is that provided there is a stipulation in the loan agreement, to the effect that the Respondent can take possession of the property hypothecated without recourse to law, the Respondent is perfectly entitled to proceed either under section 40(1) or (2) and (2a) of the Act. For obvious advantageous reasons it chose to proceed in terms of the latter subsection in which it is supported by clause 6 of the loan agreement."*

This position has been maintained in all subsequent cases which include the cases of **Agricultural Bank of Zimbabwe v (1) Luke Manyandu Thembani and Others (SC 39/07)**.

Such is the background of the present case.

2. EXHAUSTION OF LOCAL REMEDIES

On April 23, 2009, when the hearing of the application was called on, the Respondent sought leave to file its defence to the claim. The Tribunal allowed it to do so, albeit reluctantly, within 7 days from that date and directed the parties to ensure that the pleadings were settled well before June 04, 2009, the date to which the hearing of the case was postponed. The Respondent did not file the defence within the period allowed. But on May 29, 2009, the Respondent brought an application to file a supplementary affidavit by which it sought to adduce further evidence and to contend that the Tribunal had no jurisdiction to hear the application which was before it.

Rule 41 of the Rules of Procedure of SADC Tribunal (the Rules) is about closure of pleadings. It stipulates that pleadings shall close after the completion of written proceedings. By fixing a period within which the Respondent was to have filed the defence, the Tribunal, by necessary inference, also fixed the date by which pleadings were to close, namely, April 30, 2009, the date by which the defence was to be filed.

In terms of sub-rule (2) of Rule 41, no further documents may be submitted to the Tribunal by either party after the closure of pleadings except with the

consent of the other party. The Applicant refused to consent, arguing, among other things, that the Respondent was in the habit of not following the Rules, pointing out that the Tribunal was only being indulgent when it allowed the Respondent a further period to file the defence because that should have been done earlier than April 23, 2009. We agree with this observation and would only add that it is high time parties respect the orders of the Tribunal. The application to file a Supplementary Affidavit is, therefore, rejected.

This, however, does not settle the issue of jurisdiction because it is a question which we have to consider anyway in order to satisfy ourselves whether the matter is properly before us and that we have jurisdiction to hear it. We now proceed to do so.

Under Article 15(2) of the Protocol on Tribunal (the Protocol), no person may bring an action against a Member State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction. We have also referred to other international conventions such as the European Convention on Human Rights and Fundamental Freedoms of 1950 (the European Convention) and the African Charter on Human and People's Rights (the African Charter), to mention but two. In Article 26 of the European Convention, it is provided as follows:

> *"The Commission . . . may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law . . .".*

The African Charter, in Article 50, stipulates as follows:

> *"The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving the remedies would have been unduly prolonged."*

We also recall the case of **Mike Campbell (PVT) Limited v Minister of National Security Responsible for Land, Land Reform and Resettlement (SC 49/07)**. The Supreme Court in Zimbabwe had dismissed Campbell's claim saying, among other things, that the question of what protection an individual should be afforded in the Constitution in the use and enjoyment of a private property, is a question of a political and legislative character, and that as to what property should be acquired and in what manner is not a judicial question. The Court went further and observed that, by the clear and unambiguous language of the Constitution, the legislature, in the proper exercise of its powers, had lawfully ousted the jurisdiction of the courts of law from any of the cases in which a challenge to the acquisition of agricultural land may be sought.

We have also reproduced section 16(7) (d) of the Constitution of the Respondent above which provides, among other things, that nothing contained or done under the authority of any law shall be held to be in contravention of the Constitution to the extent that the law in question makes provision for the acquisition of any property or any interest or right therein, even as an incident of a contract, including a lease or mortgage, which has

been agreed between the parties to the contract. We have also replicated section 38(2) of the Act above. That section authorizes the inclusion of a clause in a loan agreement entitling the lending institution to enter upon, and take possession of the whole or any part of, the security concerned and to dispose of it.

The Supreme Court in Zimbabwe had held that in the circumstances where such clause is incorporated in a loan agreement, as is the case in the matter before us, the lending institution was entitled to proceed in terms of section 38(2) of the Act, without recourse to a court of law.

Such indeed are the circumstances in which we must decide whether or not the Applicant in the present case has exhausted all available remedies or is unable to proceed, under the domestic jurisdiction. Under Article 21(b) of the Protocol, in addition to authorizing the Tribunal to develop its own jurisprudence, the Tribunal is instructed to do so, having regard to applicable treaties, general principles and rules of public international law.

In **Mike Campbell (PVT) Limited and Others v The Republic of Zimbabwe (Case No. SADC (T) 11/08)** when considering the question of exhaustion of local remedies, the Tribunal observed as follows:

> *"The rationale for exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law . . . . However, where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not*

required to exhaust the local remedies. Further, where, as the African Charter on Human and People's Rights states, ". . . it is obvious . . . that the procedure of achieving the remedies would have been unduly prolonged," the individual is not expected to exhaust local remedies. These are circumstances that make the requirement of exhaustion of local remedies meaningless, in which case the individual can lodge a case with the international tribunal".

We would add that one of the aims concerning exhaustion of local remedies is to prevent individuals from abuse of remedies through concurrent proceedings and thus the requirement aims at avoiding parallelism of proceedings.

The effect of section 38 of the Act and indeed section 16(7) (d) of the Constitution of the Respondent is that the jurisdiction of the courts of law in Zimbabwe is ousted whenever agricultural land is acquired in the circumstances obtaining in the present application. This has been confirmed in the decisions of the Supreme Court, the highest Court in that country, which we have already referred to above.

Thus, it would be meaningless, in our view, to insist that the Applicant should have first exhausted his domestic remedies. In the circumstances, we are of the view that the Applicant is properly before us and that we have jurisdiction to consider the application, and we now proceed to do so.

3. DENIAL OF ACCESS TO THE COURTS

The next issue to be decided is whether or not the Applicant has been denied access to the courts and deprived of a fair hearing, in breach of Articles 4(c) and 6(1) of the Treaty when in November 2000 his immovable property, a farm, which he had mortgaged to ABZ as security for his loans, pursuant to various loan agreements, had been seized and sold by ABZ after he had defaulted on his debts.

It is to be noted that the loan agreements entered into by the Applicant with ABZ derived their authority from, and are governed by, the then provisions of section 40(2) and (2a) of the Act which have now been replaced by similar provisions in section 38(2), as stated already.

Section 40(2) and (2a) of the Act stated as follows:

"*(2) The Corporation may in the case of an advance in respect of which security is given, including any security by way of notarial bond or note of hand, stipulate that it shall be a condition of the advance that if any advance in respect of which security has been given becomes repayable in terms of subsection (1) the Corporation, in addition to the powers conferred by subsection (1), shall be entitled, subject to the provisions of subsection 2(a), after a period of ten days have elapsed since the posting of a registered letter of demand addressed to the borrower at his last known address or at the address given to him in his application for the advance to enter upon and take possession of*

the whole or any part of the security concerned and to dispose of such security in accordance with the provisions of the Second Schedule.

(2a) The Corporation shall be entitled to exercise the powers conferred upon it in accordance with any condition referred to in subsection (2) as soon as it has posted a registered letter of demand to the borrower in terms of that subsection where in any event referred to in paragraph (c), (d) or (e) of subsection (1) occurs:
Provided that the Corporation shall not dispose of any security so seized until the period of ten days has elapsed since the posting of the registered letter of demand."

The Supreme Court of the Respondent had the opportunity, in **John Nyamukusa v Agricultural Finance Corporation SC 174/94** and **Augustine Renusu Chizikikani v Agricultural Finance Corporation SC 123/95**, of construing section 40(2) and (2a) of the Act, together with clause 6 of the loan agreements, and came to the inevitable conclusion that ABZ could seize and take possession of the mortgaged property of the defaulting debtor without any recourse to a court of law. Moreover, the Court in ***Nyamukusa***, cited above, held that the seizure of the mortgaged property of the defaulting debtor, as in the present case, was specifically sanctioned by section 16 (7) (d) of the Constitution of the Respondent, already referred to above.

The decision in these two cases was reaffirmed in **Agricultural Bank of Zimbabwe v Tembani and Others (SC 39/07)**, already quoted above. In the light of those three judgments of the Supreme Court of the Respondent, we cannot but agree with learned Agent for the Applicant that the seizure and the sale of the property of the Applicant in the circumstances by the ABZ under the authority of the Act and the Constitution of the Respondent was in contravention of Articles 4(c) and 6(1) of the Treaty.

As the Tribunal had held in the **Mike Campbell v The Republic of Zimbabwe** case already quoted above, after citing numerous authorities:

> *"It is settled law that the concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation... Article 4 (c) of the Treaty obliges Member States of SADC to respect principle of "human rights, democracy and the rule of law" and to undertake under Article 6 (1) of the Treaty "to refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty. Consequently, Member States of SADC, including the Respondent, are under a legal obligation to respect, protect and promote those twin fundamental rights".*

In **Chief Lesapo v North West Agricultural Bank and Another 2001 (1) SA 409 CC**, the Constitutional Court of South Africa considered section 38(2) of the North West Agricultural Bank Act No. 14 of 1981 which is identical to the then section 40(2) of the Act which is now section 38(2), as

indicated already. The Court held that section 38(2) of the North West Agricultural Bank Act was in contravention of section 34 of the Constitution of the Republic of South Africa which provides as follows:-

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

The Court made the following pertinent observations which are applicable to the present case:

(1) When the constitutional status of a law is impugned, the approach to determine its constitutionality is objective, not subjective. The subjective position in which the parties find themselves cannot affect the relevant enquiry as to whether the legislation in question complies or not with human rights standards and the rule of law.

The Tribunal wishes to underline at this stage that in the present case the fact that the Applicant voluntarily signed the loan agreements which contained the standard clause 6, already mentioned above, could have no bearing on the issue as to whether or not section 40(2) of the Act and section 16(7)(d) of the Constitution of the Respondent comply with articles 4(c) and 6(1) of the Treaty, especially in view of the fact that the loan agreements derived their authority from, and are governed by, section 40(2) of the Act itself which in turn is sanctioned by section 16(7) (d) of the Constitution of the Respondent, as indicated already.

(2) *"A trial or hearing before a court or tribunal is not an end in itself. It is a means of determining whether a legal obligation exists and whether the coercive power of the State can be invoked to enforce an obligation, or prevent an unlawful act being committed. It serves other purposes as well, including that of institutionalizing the resolution of disputes, and preventing remedies being sought through self help. No one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law prevails"*- vide paragraph 11.

(3) *"An important purpose of section 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law. Execution is a means of enforcing a judgment or order of court and is incidental to the judicial process. It is regulated by statute and the Rules of Court and is subject to the supervision of the court which has inherent jurisdiction to stay the execution if the interests of justice so require. If the debt itself is disputed, the seizure of property in execution of the debt must equally be disputed. To permit a creditor to seize property of a debtor without an order of court and to cause it to be sold by the creditor's agent on the condition stipulated by the creditor to secure payment of a debt denies to the debtor the protection of the judicial process and the supervision exercised by the court through its Rules over the process of execution. Yet this is what section 38 (2) purports to do. It entitles the Bank to seize and sell property in execution whether the debt alleged to be due is disputed or not"* (the emphasis is ours)-vide paragraphs 13 and 14.

(4) Section 38 (2) the North West Agricultural Bank *"authorizes the Bank, an adversary of the debtor, to decide the outcome of the dispute. The Bank thus becomes a judge in its own cause. The authority to adjudicate over justiciable disputes and to order appropriate relief and the enforcement of the order by attachment and sale of the debtor's goods in a civil matter vests in the courts of the land. Section 38 (2), however, limits the debtor's rights in section 34 by vesting that authority in the Bank. The Bank itself decides whether it has an enforceable claim against the debtor; the Bank itself decides the outcome of the dispute and the subsequent relief; and the Bank itself enforces its own discretion, thereby usurping the powers and functions of the courts"* (the underlining is ours) - vide paragraph 20.

Moreover, in **Barkhuizen v Napier 2007 (5) SA 323 (CC)**, the Constitutional Court of South Africa stated at paragraphs 34 and 52 respectively as follows:-

(1) *"Courts have long held that a term in a contract that deprives a party of the right to seek judicial redress is contrary to public policy."*

(2) *". . . the requirement of an adequate and fair opportunity to seek judicial redress is consistent with the notions of fairness and justice which inform public policy."*

It is our considered opinion that section 38(2) of the Act and section 16(7)(d) of the Constitution of the Respondent, by preventing access to the courts.

also breaches principles of international law, in the light of the various authorities quoted by us in the **Mike Campbell v The Republic of Zimbabwe** case, cited already.

4. BREACH OF THE RULES OF NATURAL JUSTICE

As held in the **Mike Campbell v The Republic of Zimbabwe** case, quoted above, *'the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation is another principle well recognized and embodied in law'.*

We can only restate what Lord Diplock for the Board of the Judicial Committee of the Privy Council stated in **Attorney-General of the Commonwealth of the Bahamas v Ryan (1980) A.C. 718:-**

> *"It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority."*

It is noteworthy that, in the present case, ABZ had acted against the principles of natural justice in that the Applicant was not only denied the right of a hearing before an independent and impartial court or tribunal where he could contest the amount of the debt allegedly owed by him and the value of his farm which he claimed had been sold by ABZ at little more than half of its actual price, but that ABZ also became a judge in its own cause.

It is significant that no argument whatsoever was advanced by learned Agent for the Respondent in respect of the issue as to whether the Applicant has been denied access to the courts and deprived of a fair hearing before his property was seized and sold at auction by ABZ under the Act, in breach of Articles 4(c) and 6(1) of the Treaty. Counsel simply contented himself with observing that he would not at this stage, as he put it, *"respond to the legal issues"* presented on behalf of the Applicant since he considered that those issues should first be raised in the Supreme Court of the Respondent before they were dealt with by the Tribunal.

The only argument made on behalf of ABZ was in the affidavit of its representative which was to the effect that the seizure and sale of the Applicant's immovable property was analogous to the common law rights of a pledge. The short answer to this argument is, as rightly pointed out by learned Agent for the Applicant, that a pledge applies to a movable thing and not to immovable property which is subject to a mortgage, as is the case with the immoveable property of the Applicant.

We consequently hold that the Applicant has been denied access to the courts and deprived of a fair hearing, in contravention of Articles 4(c) and 6(1) of the Treaty, when his mortgaged property was seized and sold by ABZ under section 38(2) of the Act, and that the sale was illegal and void since both section 38(2) of the Act and section 16(7)(d) of the Constitution of the Respondent, which sanctions that provision of the Act , contravene Articles 4(c) and 6(1) of the Treaty.

5. CONCLUSIONS

For the reasons given, the Tribunal holds and declares that:

a. the Applicant has exhausted all local remedies;

b. the Applicant has been denied access to the courts in Zimbabwe;

c. the Respondent is in breach of its obligations under Articles 4(c) and 6(1) of the Treaty;

d. the sale in execution and subsequent transfer of the property held under Deed of Transfer 3673/85, known as the "Remainder of Minverwag of Clare Estate Ranch", situate in the Nyazura District, Zimbabwe (the property) is illegal and void;

e. the Applicant's title to the property, subject to such mortgage as has been held over it at the time of the sale in execution, remains valid;

f. the Respondent is directed to take all necessary measures, through its agents, from:
   i. evicting the Applicant or his family from the property;
   ii. interfering with the Applicant's use and occupation of the property:

iii. subjecting the property to any further sale, disposal, transfer, encumbrance or similar limitation of proprietary rights or permitting any other person or body to do so, pending the proper determination of the Applicant's debt by an independent and impartial court or tribunal.

6. COSTS

With regard to the issue of costs, we shall first refer to Rule 78 of the Rules. Rule 78 provides as follows:

"1. Each party to the proceedings shall pay its own legal costs.

2. The Tribunal may, in exceptional circumstances, order a party to the proceedings to pay costs incurred by the other party."

In terms of Rule 78, each party bears its own costs except where there are exceptional circumstances warranting the grant of costs, in the interests of justice, against a party.

The Tribunal has already construed Rule 78 in a broad and purposive manner in the case of **Nixon Chirinda and Others v Mike Campbell (PVT) Limited and Others and the Republic of Zimbabwe (SADC (T) CASE No. 09/2008)** and held that there were exceptional circumstances justifying the grant of costs in the interests of justice against a party that brought before the Tribunal a patently frivolous and vexatious application.

The Tribunal also made a costs order in **Luke Munyandu Tembani v The Republic of Zimbabwe (SADC (T) CASE No.07/2008** against the Respondent when the latter abandoned a preliminary objection on the day of hearing. The Tribunal did not appreciate the fact that the withdrawal of the objection came at the last minute and that no prior notice of the withdrawal was given to the Tribunal or to the Applicant. The Tribunal came to the conclusion that the objection taken by the Respondent was in the circumstances a frivolous and vexatious one.

We consider that there are also exceptional circumstances, on the particular facts of the present case, justifying the award of costs in favour of the Applicant in the interests of justice. In this regard, we have taken into account the fact that the Applicant is an old man of 71 years who has had to bear an intolerable burden, financial, moral and otherwise, for some nine years in fighting against the power and resources of the Respondent, which had successively and systematically used all kinds of delaying tactics, procedural objections of all kinds and even tried at the eleventh hour, against all evidence to the contrary, to contend before us that the Applicant had not exhausted domestic remedies through the failure of his legal advisers to raise certain fundamental issues relating to the case before the High Court and the Supreme Court of the Respondent, as indicated already, when in fact they had done so.

Moreover, the Respondent's learned Agent chose not to address those issues before us on the ground that, in his view, it would be better to raise them

first before the Supreme Court of the Respondent. We consider that the stand taken by Counsel both pre-empted and pre-judged our decision on the issue

of the exhaustion of local remedies which, it must be stressed again, he had raised not in the defence of the Respondent but in a supplementary affidavit which he sought belatedly to produce and which we refused to admit, as indicated already.

We take the view that, if an objective observer were present at the proceedings of the Tribunal, he or she would have come to the irresistible conclusion in the circumstances that no counter-arguments were offered on behalf of the Respondent since the Respondent knew or ought to have known that it stood no prospect of success; that the Respondent persisted all the same to pursue the matter regardless, instead of coming to terms with the Applicant who has always been willing to compromise and come to an amicable settlement with the Respondent, especially in the light of the formidable authorities produced before the Tribunal on behalf of the Applicant, including the **Mike Campbell v The Republic of Zimbabwe** case, quoted already, which had significantly decided the very same legal issues against the Respondent and in which learned Agent for the Respondent had appeared.

For all the reasons given, we consequently make a costs order against the Respondent under Rule 78(2) of the Rules. The costs are to be determined by the Registrar in case of disagreement between the parties.

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

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H. E. Justice Ariranga Govindasamy Pillay

PRESIDENT

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H. E. Justice Isaac Jamu Mtambo, SC

MEMBER

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H. E. Justice Dr. Luis Antonio Mondlane

MEMBER

.....

H. E. Justice Dr. Rigoberto Kambovo

MEMBER

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H. E. Dr. Onkemetse B. Tshosa

MEMBER

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

CASE NO. SADC (T) 05/2008

IN THE MATTER BETWEEN

BARRY L. T. GONDO	1ST APPLICANT
KERINA GWESHE	2ND APPLICANT
NYARADZAI KATSANDE	3RD APPLICANT
PETER CHIRINDA	4TH APPLICANT
PHANUEL MAPINGURE	5TH APPLICANT
RUTH MANIKA	6TH APPLICANT
SOPHIA MATASVA	7TH APPLICANT
TRUST SHUMBA	8TH APPLICANT
MERCY MAGUNJE	9TH APPLICANT

AND

THE REPUBLIC OF ZIMBABWE	RESPONDENT

CORAM

H.E. JUSTICE A.G. PILLAY	President
H.E. JUSTICE I.J. MTAMBO, SC	Member
H.E. JUSTICE DR. L.A. MONDLANE	Member

J.J. Gauntlett, SC Assisted by F.B. Pelser	Applicants' Agent
Hon. Justice M.C.C. Mkandawire	Registrar
D. Shivangulula	Court Clerk

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JUDGMENT

Delivered by H.E. Justice Ariranga Govindasamy Pillay, President

The applicants are victims of violence inflicted upon them by the National Police and/or the National Army of the Republic of Zimbabwe (the Respondent). Consequent upon the acts of violence, the Applicants instituted proceedings against the Government of Zimbabwe in various Courts in Zimbabwe. They were successful and judgments were entered as follows -

Applicant's Name	Amount Awarded	Date of Judgment
1. Barry L. T. Gondo	Z$ 5, 650, 000.00	May 17, 2006
2. Kerina Gweshe	Z$ 810, 000.00	March 01, 2006
3. Nyaradzai Katsande	Z$ 133, 144.00	February 20, 2003
4. Peter Chirinda	Z$ 3, 264, 000.00	August 17, 2003
5. Phanuel Mapingure	Z$ 950, 000.00	November 16, 2005
6. Ruth Manika	Z$ 8, 552.50	July 01, 2005
7. Sophia Matasva	Z$ 4, 850, 000.00	March 29, 2006
8. Trust Shumba	Z$ 1, 085, 000.00	October 04, 2004
9. Mercy Magunje	Z$ 9, 030.00	January 2007

The Courts also made orders for interest in respect of each award and gave costs to the Applicants. The judgment debts have not been paid. It is upon the non-compliance with the judgments or orders of the Courts that this application has been brought.

The Applicants' case is that the Respondent has violated Articles 4 (c) and 6 (1) of the Treaty of the Southern African Development Community, SADC, (the Treaty) by:

(a) failing to ensure that effective remedies are available to them, and thus failing to act in accordance with the principles of human rights, and

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(b) implementing measures likely to jeopardize the principles of human rights provided for in the Treaty

Article 4 (c) provides:

"SADC and its Member States shall act in accordance with the following principles . . . human rights, democracy, and the rule of law."

Article 6 (1) states as follows:

"Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measures likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty."

In the circumstances, the Applicants seek, the following reliefs:

(a) a declaration that the Respondent is in breach of the Treaty by failing to comply with Orders of the High Court of that country;

(b) a declaration that section 5 (2) of the State Liability Act [Cap 8:14] of the Respondent is in breach of the Treaty in so far as it provides that property of the State may not form the subject-matter of execution, attachment or process to satisfy a judgment debt;

(c) such further and/or alternative reliefs as the Tribunal may deem fit.

They also claim costs of the proceedings.

We note at the outset that while the application is indeed chiefly about the Respondent's non-compliance with the orders or judgments of its own Courts of law, it also raises the issue whether section 5 (2) of the State Liability Act of the Respondent, is compatible with the obligations of the Respondent under the Treaty in so far as it immunizes the Respondent from enforcement of judgment debts

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and, ultimately, the observance of the rule of law. Section 5 (2), in the relevant part, reads:

> *"Subject to this section, no execution, or attachment, or process in the nature thereof shall be issued against the defendant or respondent in any action or proceedings... against any property of the State, but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund such sum of money as may, by a judgment or order of the court, be awarded to the plaintiff, the applicant or petitioner, as the case may be."*

Such are the facts before us to which we must now apply the law. We must also mention here that the Respondent has left default and not opposed the application on the merits.

As held by this Tribunal in **Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe (SADC (T) Case No 2 of 2007**, Article 4 (c) of the Treaty obliges Member States of SADC to respect principles of *"human rights, democracy and the rule of law"* and to undertake in terms of Article 6 (1) of the Treaty *"to 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"*. Consequently, Member States of SADC, including the Respondent, are under a legal obligation to respect, protect and promote human rights, democracy and the rule of law.

It is settled law that the concept of the rule of law embraces at least four fundamental rights, namely, the right to have an effective remedy, the right to have access to an independent and impartial court or tribunal, the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation, the right to equality before the law and the right to equal protection of the law.

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Article 2 (3) of the International Covenant on Civil and Political Rights (the Covenant), which the Respondent has ratified, states as follows –

"Each State Party to the present Covenant undertakes:

(a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) to ensure that the competent authorities shall enforce such remedies when granted (the underlining is ours)".

Article 5 (1) of the Covenant states that the provisions of Article 2 (3) above may not be impaired or limited through governmental acts, legislative or otherwise. It provides as follows –

"Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant".

Article 2 (3) of the Covenant, when read in conjunction with Article 5, thus forbids, in our view, any legislation or conduct which may render remedies ineffective or may obstruct the implementation of judicial remedies or may provide State immunity from enforcement of Court orders.

Furthermore, Articles 27 and 60 of the Vienna Declaration and Programme of Action provide as follows –

"Every State should provide an effective framework of remedies to redress

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human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development. . . ." (the emphasis is ours).

Article 13 of the European Convention on Human Rights provides as follows -

"Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

In **Ramirez, Sanchez, v. France [GC], No. 59450/00, ECHR 2006-IX – (4.7.06)**, the European Court of Human Rights held that the absence of a remedy constitutes a violation of the Convention. Where a remedy exists, it must be both effective in practice as well as in law.

In the **Campbell** case, cited above, reference was made by this Tribunal to the pronouncement of the Inter-American Court of Human Rights on Article 27 (2) of the American Convention of Human Rights which requires American States to respect effective remedies before Courts of law or competent tribunals as follows -

"the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of

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the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective" (underlining is ours) – vide paragraph 41 of the **Advisory Opinion OC-9-87 of October, 1987, Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights)**.

The African Charter on Human and Peoples' Rights (the Charter) which the Respondent has ratified, for its part, provides in Article 7(1) (a) as follows –

"Every individual shall have the right to have his case heard. This comprises:

(a) the right to an appeal to competent national organs against acts of violating his fundamental rights . . . ."

In **Bissangou v Republic of (2006) AHRLR 80 (ACHPR 2006)**, the African Commission in dealing with the State's refusal to pay a judgment debt stated at paragraphs 75 and 77 as follows –

". . .Article 7 includes the right to the execution of judgment. It would therefore be inconceivable for this article to grant the right for an individual to bring an appeal before all the national courts in relation to any act violating the fundamental rights without guaranteeing the execution of judicial rulings... as a result, the execution of a final judgment passed by a tribunal or legal court should be considered as an integral part of 'the right to be heard which is protected in Article 7.

The African Commission remains conscious of the fact that without a system of effective execution, other forms of private justice can spring up and have negative consequences on the confidence and credibility of the public in the justice system."

Article 26 of the Charter provides as follows: -

"States Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and

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improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

In **Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) Zimbabwe 294/04,** the African Commission held that Zimbabwe had violated Articles 26 and stated in paragraphs 118 to 120 as follows: -

"It is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that courts and tribunals resolve disputes both of a criminal and civil character free of any form of pressure or interference. The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law of the factual merits of the dispute. Without the rule of law and the assurance that comes from an independent judiciary, it is obvious that equality before the law will not exist.

It is a vital requirement in a state governed by law that court decisions be respected by the State, as well as individuals. The courts need the trust of the people in order to maintain their authority and legitimacy. The credibility of the courts must not be weakened by the perception that courts can be influenced by any external pressure.

Thus, by refusing to comply with the High Court orders, staying the deportation of Mr. Meldrum and requiring the Respondent State to produce him before the Court, the Respondent State undermined the independence of the Courts. This was a violation of Article 26 of the African Charter (the emphasis is ours).

Finally, reference may be made to a decision of one of the Courts in the SADC region, the Constitutional Court of South Africa, which has underlined the importance of States complying with Court orders. In **Nyathi v MEC for**

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Department of Health, Gauteng and Another Case CCT 19/07 (2008) ZACC 8 the Constitutional Court stated at paragraph 80 as follows -

> *"...In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That... means at the very least that there should be strict compliance with court orders."*

We hold, therefore, in the light of the authorities quoted above, that the Respondent is in breach of Articles 4 (c) and 6 (1) of the Treaty in that it has acted in contravention of various fundamental human rights, namely the right to an effective remedy, the right to have access to an independent and impartial Court or tribunal and the right to a fair hearing.

We now turn to examine the effect of section 5 (2) of the State Liability Act (Chapter 8:14) of the Respondent which has already been reproduced.

Section 5(2) is similar to section 3 of the State Liability Act 20 of 1957 of South Africa which was declared unconstitutional by the Constitutional Court in **Nyathi,** already cited above. The Court held that section 3 placed the State above the law since it did not oblige the State to comply with court orders. The Court stated, inter alia, that section 3 infringed –

(a) the right to equality since it disallows a judgment creditor who obtains judgment against the State the same protection and benefit that a judgment creditor who obtains judgment against a private litigant enjoys;

(b) the right of access to Courts since *"deliberate non-compliance with, or disobedience of, a court order by the State detracts from the dignity, accessibility and effectiveness of the courts"*. Indeed, the right of access to Courts obliges the State to ensure the enforceability of Court orders – vide paragraphs 40 and 43.

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The Court stated at paragraph 18 that the State liability Act *"is a relic of a legal regime which was pre-constitutional and placed the state above the law: a state that operated from the premise that "the king can do no wrong". That state of affairs ensured that the state and, by parity of reasoning, its officials could not be held accountable for their actions"* (the emphasis is ours).

The Constitutional Court also considered at paragraph 50 that these violations constituted unreasonable and unjustifiable limitations to the human rights involved and that *"the more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be..."* The Court then explained at paragraphs 51 and 52 that *"section 3 serves to protect the state interests by disallowing attachment as it has the potential to disrupt service delivery and interfere with the state's accounting procedures. The Act does purport to make the state liable for judgment debts that accrue against it. However, the processes involved in gaining satisfaction of such debts are not in place. The doors are closed before compliance has been achieved."*

The Court went on to remark at paragraph 79 on the practical effect of section 3 as follows –

> *"The practical effect of section 3 is that the state cannot be forced to honour court orders as there is no manner in which compliance can be enforced. In the result, the ordinary citizen has no effective remedy available in a situation where the state and its officials fail to comply with a court order."*

The Court tellingly rejected at paragraphs 75 and 79 an argument to the effect that since a judgment creditor could seek a *mandamus* or, for that matter, initiate contempt of court proceedings, the restriction or execution against state assets was justified. The Court stated that such an argument ignored the harsh realities of litigation with its risks and expenses.

We would also refer to Article 26 of the Covenant which states as follows –

> *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

The Human Rights Committee has explained the provisions of Article 26 in its **General Comment No. 18 on Non-Discrimination:1989/11/10, C.C.P.R.** at paragraphs 7 and 12 as follows:

> *"The Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."*

> *". . . Article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other*

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words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for the Covenant" (the underlining is ours).

It follows, therefore, that the list of grounds of discrimination in Article 26 is non-exhaustive and that section 5(2) of the State Liability Act of the Respondent is discriminatory in its content under Article 26 of the Covenant since it treats judgment creditors unequally in that a judgment creditor who obtains judgment against the State is not given the same protection and benefit that a judgment creditor who obtains judgment against a private litigant is accorded.

Article 3(1) of the Charter states as follows –

"Every individual shall be equal before the law."

In the **Zimbabwe Lawyers'** case, cited above, the African Commission has interpreted this article as follows at paragraph 96 –

"The most fundamental meaning of equality before the law under Article 3 (1) of the Charter is the right by all to equal treatment under similar conditions. The right to equality before the law means that individuals legally within the jurisdiction of a State should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. Its meaning is the right to have the same procedures and principles applied under the same conditions. The principle that all persons are equal before the law means that existing laws must be applied in the same manner to those subject to them. The right to equality before the law does not refer to the content of legislation, but rather exclusively to its enforcement. It means that judges and administration officials may not act arbitrarily in enforcing laws."

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We consider that, although the African Commission has restricted its meaning of the right to equality before the law to the enforcement of the law as such, if the content of the law itself does not allow the law to be enforced equally, as in the case of section 5(2) of the State Liability Act of the Respondent, then Article 3 (1) would be infringed, as the Human Rights Committee has demonstrated in the General Comment No. 18, quoted earlier.

We consider that section 5 (2) of the State Liability Act of the Respondent is also in contravention of Article 3 (2) of the African Charter which lays down that *"every individual shall be entitled to equal protection of the law."*

The African Commission has interpreted Article 3 (2) in the **Zimbabwe Lawyers'** case, already quoted, at paragraphs 99 – 101 as follows -

> *"Equal protection of the law under Article 3 (2) on the other hand, means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances in their lives, liberty, property and in their pursuit of happiness. It simply means that similarly situated persons must receive similar treatment under the law.*
>
> *In its decision in* ***Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development [in Africa]//Republic of Zimbabwe, (293/04)*** *this Commission relied on the Supreme Court decision in* ***Brown v Board of Education of Topeka****, in which Chief Justice Earl Warren of the United States of America argued that 'equal protection of the law refers to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts both in procedures and in the substance of the law. It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness'.*
>
> *In order for a party therefore to establish a successful claim under Article 3 (2) of the Charter, it should show that the Respondent State had not given the*

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Complainant the same treatment it accorded to the others. Or that the Respondent State had accorded favourable treatment to others in the same position as the Complainant."

We hold, therefore, that, in the light of all the authorities already quoted by us, section 5(2) of the State Liability Act of the Respondent is not only in breach of the right to an effective remedy, the right to have access to an independent and impartial court or tribunal and the right to a fair hearing but also in contravention of the right to equality before the law and the right to equal protection of the law, and, therefore, is incompatible with the Respondent's obligations under Articles 4 (c) and 6 (1) of the Treaty.

We can only reiterate at this stage what the Inter-American Court of Human Rights stated at paragraph 35 of its **Advisory Opinion** given in 1987, quoted in **Campbell**, already cited, namely that the rule of law, representative democracy and personal liberty are essential for the protection of human rights and that *"in a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning."*

In this regard, we draw the attention of any Member State of SADC to the adverse effect which its existing State immunity or State liability legislation has on the principles of human rights, democracy and the rule of law in so far as such legislation provides that State property cannot be the subject-matter of execution, attachment or process in satisfaction of a judgment debt.

We turn now to the issue of the damages awarded to the Applicants which, according to learned Counsel for the Applicants, should be revalorised, given that the currency of the Respondent has suffered excessive depreciation over the years.

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In Eden and Another v Pienaar 2000 (1) SA 158 (WLD), the Court explained the process of revalorisation, at paragraph 159B as follows -

> *"This process by which the law seeks to reflect and (counteract) the influence of inflation on the amount of a claim is known as 'revalorisation'. Its effect is that the depreciation of currency does not redound to the benefit of the judgment debtor, and to ensure that judgment creditor is protected against the ravages of inflation by receiving the actual value of the amount awarded in judgment, as on the day on which he is paid – no less and certainly no more. Although the face value of the debt increases once revalorisation is applied, its real value does not: the purchasing power of the currency in which it is expressed remains constant. Accordingly, revalorisation has nothing to do with interest, nor does it increase the real value of a debt."*

In this connection, reference may also be usefully made to Article 12(h) of the SADC Charter of Fundamental Social Rights where the process of revalorisation is also mentioned and which states as follows -

> *"Workers have the right to services, that provide for the prevention, recognition, detection and compensation work related illness or injury, including emergency care, with rehabilitation and reasonable job security after injury and adequate inflation-adjusted compensation" (the underlining is ours).*

The amount of damages awarded to the Applicants must, in our opinion, be revalorised, in the interests of justice, in order to ensure that the real or actual value of the compensation awarded in the various Court orders is received by each Applicant on the date of full and final payment, after taking into account the adverse effects of runaway inflation. In other words, the damages awarded to the Applicants must be inflation-adjusted.

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We therefore hold and declare that –

(a) section 5 (2) of the State Liability Act [Chapter 8:14] of the Respondent is in contravention of the fundamental rights to have an effective remedy; to have access to the Courts; to be entitled to a fair hearing, to equality before the law and to equal protection of the law; in so far as it provides that property of the State may not form the subject-matter of execution, attachment or process to satisfy a judgment debt;

(b) the Respondent has acted in contravention of Article 4 (c) and 6 (1) of the Treaty by:

(i) failing to comply with the orders of the High Court of Zimbabwe regarding the Applicants;

(ii) persisting in its non-compliance with the Court orders referred to in sub paragraph (i) above.

We further order the Respondent's agents to meet with the agents of the Applicants, under the supervision of the Registrar, to agree to a mutually satisfactory adjustment to the damages awarded in the Court orders referred to in paragraph (b)(i) above.

In the event of non-compliance with the order made above by the Tribunal, the Applicants may revert to this Tribunal on the same papers, appropriately amplified if necessary, in terms of Article 32 (4) of the Protocol on Tribunal, on written notice to the Respondent's agents, for further relief regarding enforcement.

With regard to the issue of costs, we shall first refer to Rule 78 of the Rules of Procedure of SADC Tribunal (the Rules).

Rule 78 provides as follows:

"1. *Each party to the proceedings shall pay its own legal costs.*

2. *The Tribunal may, in exceptional circumstances, order a party to the proceedings to pay costs incurred by the other party."*

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In terms of Rule 78, each party bears its own costs except where there are exceptional circumstances warranting the grant of costs, in the interests of justice, against a party.

We consider that there are exceptional circumstances on the particular facts of the present case justifying the award of costs to the Applicants in the interests of justice. We need only to highlight in this regard the fact that the Respondent persistently flouted the orders of its own High Court and that the Applicants have not yet been paid the compensation to which they are entitled since the court orders were made in their favour in 2006 (in respect of the first and second Applicants), 2003 (in respect of the third and fourth Applicants), 2005 (in respect of the fifth and sixth Applicants), 2006 (in respect of the seventh Applicant), 2004 (in respect of the eighth Applicant) and 2007 (in respect of the ninth Applicant). We accordingly award costs to the Applicants, under Rule 78(2) of the Rules. The costs are to be taxed by the Registrar.

Delivered in open Court this 9th day of December 2010, at Windhoek in the Republic of Namibia.

.....

H.E. Justice Ariranga Govindasamy Pillay

PRESIDENT

.....

H. E. Justice Isaac Jamu Mtambo, SC

MEMBER

.....

H.E. Justice Dr Luis Antonio Mondlane

MEMBER

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

CASE NO SADCT: 2/07

In the matter between:

MIKE CAMPBELL (PVT) LIMITED FIRST APPLICANT

And

WILLIAM MICHAEL CAMPBELL SECOND APPLICANT

Versus

THE REPUBLIC OF ZIMBABWE RESPONDENT

CORAM:

HON. JUSTICE Dr MONDLANE - PRESIDENT
HON. JUSTICE MTAMBO, SC - MEMBER
HON. JUSTICE Dr TSHOSA - MEMBER

APPLICANTS' AGENTS - ADRIAN PHILLIP DE BOURBON

- ELIZE M. ANGULA

RESPONDENT'S AGENTS - FATIMA C. MAXWELL
NELSON MUTSONZWA

HON. JUSTICE M.C.C. MKANDAWIRE – REGISTRAR
MR DENNIS SHIVANGULULA – COURT CLERK

RULING

Hon. Justice Dr Luis Antonio Mondlane delivered the Ruling

On 11 October 2007 the applicants filed a case with the Tribunal challenging the acquisition of an agricultural land known as Mount Carmell in the District of Chegutu in the Republic of Zimbabwe by the respondent. An application was simultaneously filed pursuant to Article 28 of the Protocol on Tribunal (hereinafter referred to as the Protocol) as read with Rule 61 sub-rules (2) – (5) of the Rules of Procedure (hereinafter referred to as the Rules) for an interim measure restraining the respondent from removing, or allowing the removal of, the applicants from the agricultural land mentioned above and mandating the respondent to take all necessary and reasonable steps to protect the occupation by the applicants of the said land until the dispute has been finally adjudicated. In essence, the applicants are asking the Tribunal to order that the *status quo* in the agricultural land be preserved until the final decision is made in relation to the case.

Before dealing with the application, there are preliminary issues that should be determined. Firstly, whether the parties in the case are those that are envisaged by Article 15(1) of the Protocol. The article provides:

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

This is indeed a dispute between a natural and a legal person and a State. We

hold that Article 15(1) of the Protocol has been met and therefore that the matter is properly before the Tribunal.

Secondly, there is the issue relating to jurisdiction. Article 14 of the Protocol provides:

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

The interpretation and application of the SADC Treaty and the Protocol is therefore one of the bases of jurisdiction. For purposes of this application, the relevant provision of the Treaty which requires interpretation and application is Article 4, which in the relevant part provides:

> "SADC and Member States are required to act in accordance with the following principles – (c) human rights, democracy and the rule of law."

This means that SADC as a collectivity and as individual member States are under a legal obligation to respect and protect human rights of SADC citizens. They also have to ensure that there is democracy and the rule of law within the region. The matter before the Tribunal involves an agricultural land, which the applicants allege that it has been acquired and that their property rights over that piece of land have thereby been infringed. This is a matter that requires interpretation and application of the Treaty thus conferring jurisdiction on the Tribunal.

Thirdly, as indicated earlier, the application is brought pursuant to Article 28 of the Protocol. The Article provides:

> "The Tribunal or the President may, on good cause, order the suspension of an act challenged before the Tribunal and may take other interim measures as necessary."

This clause is complemented by Rule 61 (2) – (5). The Rule requires the application for an interim measure to be made by a party to a case during the course of the proceedings, stating the subject matter of the proceedings, the reasons for the application, the possible consequences if the application is not granted and the interim measure requested, and finally that the application for an interim measure shall take priority over all other cases. These provisions empower the Tribunal or the President of the Tribunal to make an appropriate interim order upon good cause being shown.

During the hearing the agents of the parties raised other preliminary issues. The applicants' agent raised the issue of the respondent's failure to file some documents within the timelines set by the Tribunal as required by Rule 36(2) of the Rules. These documents are the "Notice of Opposition" and an "Application for Condonation for Late Filing of Opposing Papers", which were filed on the morning of the date of the hearing, 11 December 2007, according to the official date stamp of the Registry. The agent argued that there is no basis for the documents in question to be considered by the Tribunal. He, however, submitted that in the interest of progress he could not insist on the point except that it should be placed on record that the respondent disregarded the Rules.

In reply, the respondent's agent denied that the respondent has disregarded the Rules concerning filing of papers. He said that failure to file the opposing papers on time was caused by administrative matters and consultations in the Republic of Zimbabwe. However, the agent argued that the respondent has substantially complied with the Rules and implored the

Tribunal to use its inherent powers in terms of Rule 2(2) to condone the late filing of the opposing papers to ensure that the ends of justice are met. The agent further argued that, in any case, the applicants have not shown that they have suffered any prejudice due to the late filing of the opposing papers. It should be noted that the agent of the applicants indicated that he did not wish to insist on the matter and that in the interest of progress the hearing could proceed. It was also the position of the Tribunal that in the interest of justice the application should proceed and therefore the Tribunal accepted the application for condonation for late filing of opposing papers by the respondent.

As regards the present application, the applicants' agent submitted that the applicants wanted protection pending the final determination of the dispute between them and the respondent. He argued that the Tribunal was set up to protect the interests of SADC citizens, and that in terms of Article 21 of the Protocol, it has the powers not only to apply the Treaty and the protocols thereunder, but also to develop the 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. He further argued that for the Tribunal to be effective it should be seen to be protecting the rights and interests of the SADC citizens. According to the applicants' agent, the Tribunal should adopt the criteria that are used in other jurisdictions when deciding whether or not to grant an interim measure. He said the criteria are the following:

a) a *prima facie* right that is sought to be protected;
b) an anticipated or threatened interference with that right;

c) an absence of any alternative remedy;

d) the balance of convenience in favour of the applicant, or a discretionary decision in favour of the applicant that an interdict is the appropriate relief in the circumstances.

The applicants' agent therefore argued that the application meets these criteria and that the balance of convenience tilts in favour of the applicants because they stand to suffer prejudice if the interim relief is not granted. Moreover, the agent argued that the respondent would not be prejudiced by the granting of the relief sought. This point was conceded by the agent of the respondent during the hearing of the application. Regarding the application, it is observed that the respondent's agent did not oppose it. He only concentrated on the issue relating to exhaustion of local remedies. He submitted that in terms of Article 15(2) of the Protocol, the applicants have not exhausted local remedies. The text provides:

> "No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction."

According to the respondent, it was argued, the applicants have not complied with this provision. The agent submitted that the applicants have a matter pending before the Supreme Court of Zimbabwe in which the relief sought is similar to the one that they are seeking from the Tribunal. The respondent's agent said that the matter referred to is awaiting judgment by the Supreme Court. The applicants' agent does not disagree. The respondent's agent therefore argued that the application cannot be brought before the Tribunal.

The respondent's agent also argued that if the applicants wanted protection pending the decision of the Supreme Court, they should have approached the domestic courts but they have not done so. Regarding the latter point, the applicants' agent contended that Section 16B (3) (a) of the Constitution of Zimbabwe oust the jurisdiction of the courts in matters concerning land

acquisition.

Referring to the issue of failure to exhaust local remedies by the applicants, we are of the view that the issue is not of relevance to the present application but that it may only be raised in the main case. It may not be raised in the present case in which the applicants are seeking an interim measure of protection pending the final determination of the matter. Thus the Tribunal need not consider the issue of whether or not the applicants have exhausted local remedies. In the circumstances, the contention relating to exhaustion of local remedies is unsuccessful.

We have observed above that the respondent did not oppose the present application. We have also alluded to the criteria advanced by the applicants' agent which should be applied in determining applications of this nature. We agree with the criteria. In the present application there is a *prima facie* right that is sought to be protected, which involves the right to peaceful occupation and use of the land; and there is anticipated or threatened interference with that right; and the applicants do not appear to have any alternative remedy thereby tilting the balance of convenience in their favour.

Accordingly, the Tribunal grants the application pending the determination of the main case and orders that the Republic of Zimbabwe shall take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by orders, to evict from or interfere with the peaceful residence on and beneficial use of the farm known as Mount Carmell of Railway 19, measuring 1200.6484 hectares held under Deed of Transfer No. 10301/99, in the District of Chegutu in the Republic of Zimbabwe, by Mike Campbell (PvT) Limited and William Michael Campbell, their employees and the families of such employees and of William Michael Campbell.

The Tribunal makes no order as to costs.

Delivered in Open Court this _____ day of _____ 2007

at Windhoek in the Republic of Namibia.

Hon. Justice Dr Luis Anthonio Mondlane
(President)

Hon. Justice Isaac Jamu Mtambo, SC
(Member)

Hon. Justice Dr Onkemetse Tshosa
(Member)

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

SADC (T) Case No. 2/2007

IN THE MATTER BETWEEN

Mike Campbell (Pvt) Ltd.	1st Applicant
William Michael Campbell	2nd Applicant
Gideon Stephanus Theron	3rd Applicant
Douglas Stuart Taylor-Freeme	4th Applicant
Merle Taylor-Freeme	5th Applicant
Konrad Van Der Merwe	6th Applicant
Louis Karel Fick	7th Applicant
Andrew Paul Rosslyn Stidolph	8th Applicant
R.J Van Rensburg and Sons (Pvt) Ltd.	9th Applicant
Reinier Janse Van Rensburg (Senior)	10th Applicant
Harlen Brothers (Pvt) Ltd.	11th Applicant
Raymond Finaughty	12th Applicant
Bounchcap (Pvt) Ltd.	13th Applicant
Dirk Visagie	14th Applicant
Sabaki (Pvt) Ltd.	15th Applicant
William Bruce Rogers	16th Applicant
J.B.W Arden & Sons (Pvt) Ltd.	17th Applicant
William Gilchrist Nicolson	18th Applicant
Richard Thomas Etheredge	19th Applicant
John Norman Eastwood	20th Applicant
Johannes Frederick Fick	21st Applicant
W.R Seaman (Pvt) Ltd.	22nd Applicant
Wayne Redvers Seaman	23rd Applicant
Petrus Stephanus Martin	24th Applicant
Ismael Campher Pasques	25th Applicant
Claremont Estates (Pvt) Ltd.	26th Applicant
Gramara (Pvt) Ltd.	27th Applicant
Colin Baillie Cloete	28th Applicant
Blakle Stanley Nicolle	29th Applicant
Newmarch Farm (Pvt) Ltd.	30th Applicant

John McCleary Beatie	31st Applicant
Hermanus Gerhardus Grove	32nd Applicant
Frederick Willem Biutendag	33rd Applicant
L.M.Farming (Pvt) Ltd.	34th Applicant
Bart Harvey McClelland Wilde	35th Applicant
P.N.Stidolph (Pvt) Ltd.	36th Applicant
Neville Stidolph	37th Applicant
Katambora Estates (Pvt) Ltd.	38th Applicant
Andrew Roy Ferreira	39th Applicant
Herbst Estate (Pvt) Ltd.	40th Applicant
Andrew Marc Ferangcon Herbst	41st Applicant
Izak Daniel Nel	42nd Applicant
Johannes Hendrik Oosthuizen	43rd Applicant
Murray Hunter Pott	44th Applicant
Gary Bruce Hensman	45th Applicant
Charles Thomas Schoultz	46th Applicant
Jack Walter Hall	47th Applicant
Busi Coffee Estate (Pvt) Ltd.	48th Applicant
Algernan Tracy Taffs	49th Applicant
Elsje Hester Herbst	50th Applicant
Cristoffel Gideon Herbst	51st Applicant
Jacobus Adriaan Smit	52nd Applicant
Palm River Ranch (Pvt) Ltd.	53rd Applicant
John Robert Caudrey Beverley	54th Applicant
Robert Anthony McKersie	55th Applicant
S.C.Shaw (Pvt) Ltd.	56th Applicant
Grant Ian Locke	57th Applicant
Peter Foster Booth	58th Applicant
Aristides Peter Landos	59th Applicant
Ann Lourens	60th Applicant
N & B Holdings (Pvt) Ltd.	61st Applicant
Digby Sean Nesbitt	62nd Applicant
Kenneth Charles Ziehl	63rd Applicant
Kenyon Garth Baines Ziehl	64th Applicant
Mleme Estate (Pvt) Ltd.	65th Applicant
Jean Daniel Cecil de Robbilard	66th Applicant
Anglesea Farm (Pvt) Ltd.	67th Applicant
Gameston Enterprises (Pvt) Ltd.	68th Applicant
Malundi Ranching Co (Pvt) Ltd.	69th Applicant

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Gwelmid Property Holdings (Pvt) Ltd.	**70th Applicant**
Tamba Farm (Pvt) Ltd.	**71st Applicant**
R.H.Greaves (Pvt) Ltd.	**72nd Applicant**
Heany Junction Farms (Pvt) Ltd.	**73rd Applicant**
Rudolf Isaac Du Preez	**74th Applicant**
Walter Bryan Lawry	**75th Applicant**
Derek Alfred Rochat	**76th Applicant**
Christopher Mellish Jarrett	**77th Applicant**
Tengwe Estate (Pvt) Ltd.	**78th Applicant**
France Farm (Pvt) Ltd.	**79th Applicant**

AND

The Republic of Zimbabwe	**Respondent**

CORAM:

H.E. JUSTICE ARIRANGA GOVINDASAMY PILLAY	**PRESIDENT**
H.E. JUSTICE ISAAC JAMU MTAMBO, SC	**MEMBER**
H.E. JUSTICE DR. LUIS ANTONIO MONDLANE	**MEMBER**
H.E. DR. RIGOBERTO KAMBOVO	**MEMBER**
H.E. DR.ONKEMETSE B. TSHOSA	**MEMBER**

APPLICANT'S AGENTS	**J. J. GAUNTLETT, SC** **A. P. DE BOURBON, SC** **J L JOWELL QC** **E. N. ANGULA (MRS), COUNSEL**
RESPONDENT'S AGENTS	**P. MACHAYA, DEPUTY ATTORNEY-GENERAL** **N. MUTSONZIWA (MRS), CHIEF LAW OFFICER**

HON. JUSTICE M. C. C. MKANDAWIRE	**REGISTRAR**
MR. DENNIS SHIVANGULULA	**COURT CLERK**

JUDGEMENT

Delivered by H. E. JUSTICE DR. LUIS ANTONIO MONDLANE

I FACTUAL BACKGROUND

On 11 October, 2007, Mike Campbell (Pvt) Limited and William Michael Campbell filed an application with the Southern African Development Community Tribunal (the Tribunal) challenging the acquisition by the Respondent of agricultural land known as Mount Carmell in the District of Chegutu in the Republic of Zimbabwe. Simultaneously, they filed an application in terms of Article 28 of the Protocol on Tribunal (the Protocol), as read with Rule 61 (2) – (5) of the Rules of Procedure of the SADC Tribunal (the Rules), for an interim measure restraining the Respondent from removing or allowing the removal of the Applicants from their land, pending the determination of the matter.

On 13 December, 2007, the Tribunal granted the interim measure through its ruling which in the relevant part stated as follows:

> *"[T]he Tribunal grants the application pending the determination of the main case and orders that the Republic of Zimbabwe shall take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by orders, to evict from or interfere with the peaceful residence on, and beneficial use of, the farm known as Mount Carmell of Railway 19, measuring 1200.6484 hectares held under Deed of Transfer No. 10301/99, in the District of Chegutu in the Republic of Zimbabwe, by Mike Campbell (Pvt) Limited and William Michael Campbell, their employees and the families of such employees and of William Michael Campbell".*

Subsequently, 77 other persons applied to intervene in the proceedings, pursuant to Article 30 of the Protocol, as read with Rule 70 of the Rules.

Additionally, the interveners applied, as a matter of urgency, for an interim measure restraining the Respondent from removing them from their agricultural lands, pending the determination of the matter.

On 28 March, 2008, the Tribunal granted the application to intervene in the proceedings and, just like in the Mike Campbell (Pvt) Ltd. and William Michael Campbell case, granted the interim measure sought.

Mike Campbell (Pvt) Ltd. and William Michael Campbell case as well as the cases of the 77 other Applicants were thus consolidated into one case, hereinafter referred to as the **Campbell** case – vide **Case SADC (T) No. 02/2008**.

On the same day another application to intervene was filed by Albert Fungai Mutize and others **(Case SADC (T) No. 08/2008)**. The Tribunal dismissed this application on the basis that it had no jurisdiction to entertain the matter since the alleged dispute in the application was between persons, namely, the Applicants in that case and those in the

Campbell case and **not** between persons and a State, as required under Article 15 (1) of the Protocol.

On 17 June, 2008, yet another application to intervene in the proceedings was filed. This was by Nixon Chirinda and others – **Case SADC (T) No. 09/2008.** The application was dismissed on the same ground as in **Case SADC (T) No. 08/2008.**

On 20 June, 2008, the Applicants referred to the Tribunal the failure on the part of the Respondent to comply with the Tribunal's decision regarding the interim reliefs granted. The Tribunal, having established the failure, reported its finding to the Summit, pursuant to Article 32 (5) of the Protocol.

In the present case, the Applicants are, in essence, challenging the compulsory acquisition of their agricultural lands by the Respondent. The acquisitions were carried out under the land reform programme undertaken by the Respondent.

We note that the acquisition of land in Zimbabwe has had a long history. However, for the purposes of the present case, we need to confine ourselves only to acquisitions carried out under section 16B of the Constitution of Zimbabwe (Amendment No. 17, 2005), hereinafter referred to as Amendment 17.

Section 16B of Amendment 17 provides as follows:

> *"16B: **Agricultural land acquired for resettlement and other purposes***
>
> *(1) In this section -*
>
> ***"acquiring authority"** means the Minister responsible for lands or any other Minister whom the President may appoint as an acquiring authority for the purposes of this section;*

*"**appointed day**" means the date of commencement of the Constitution of Zimbabwe Amendment (No. 17) Act, 2004* (i.e. 16 September, 2005)

(2) Notwithstanding anything contained in this Chapter

-

(a) all agricultural land -

(i) that was identified on or before the 8th July, 2005, in the Gazette or Gazette Extraordinary under section 5 (1) of the Land Acquisition Act [Chapter 20:10], and which is itemized in Schedule 7, being agricultural land required for resettlement purposes; or

(ii) that is identified after the 8th July, 2005, but before the appointed day (i.e. 16th September, 2005), *in the Gazette or Gazette Extraordinary under section 5 (1) of the Land Acquisition Act [Chapter 20:10], being agricultural land required for resettlement purposes; or*

(iii) that is identified in terms of this section by the acquiring authority after the appointed day in the Gazette or Gazette Extraordinary for whatever purposes, including, but not limited to

-

A. settlement for agricultural or other purposes; or

B. the purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or

C. the relocation of persons dispossessed in consequence of the utilization of land for a purpose referred to in subparagraph A or B;

is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to in

subparagraph (iii), with effect from the date it is identified in the manner specified in that paragraph; and

(b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

(3) The provisions of any law referred to in section 16 (1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18 (1) and (9), shall not apply in relation to land referred to in subsection (2) (a) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2) (b), that is to say, a person having any right or interest in the land -

(a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge;

(b) *may, in accordance with the provisions of any law referred to in section 16 (1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired".*

Amendment 17 effectively vests the ownership of agricultural lands compulsorily acquired under Section 16B (2) (a) (i) and (ii) of Amendment 17 in the Respondent and ousts the jurisdiction of the courts to entertain any challenge concerning such acquisitions. It is on the basis of these facts that the present matter is before the Tribunal.

II SUBMISSIONS OF THE PARTIES

It was submitted, in substance, on behalf of the Applicants that:

(a) the Respondent acted in breach of its obligations under the Treaty by enacting and implementing Amendment 17;

(b) all the lands belonging to the Applicants which have been compulsory acquired by the Respondent under Amendment 17 were unlawfully acquired since the Minister who carried out the compulsory acquisition failed to establish that he applied reasonable and objective criteria in order to satisfy himself that the lands to be acquired were reasonably necessary for resettlement purposes in conformity with the land reform programme;

(c) the Applicants were denied access to the courts to challenge the legality of the compulsory acquisition of their lands;

(d) the Applicants had suffered racial discrimination since they were the only ones whose lands have been compulsory acquired under Amendment 17, and

(e) the Applicants were denied compensation in respect of the lands compulsorily acquired from them.

Learned Counsel for the Applicants submitted, in conclusion, that the Applicants, therefore, seek a declaration that the Respondent is in breach of its obligations under the Treaty by implementing Amendment 17 and that the compulsory acquisition of the lands belonging to the Applicants by the Respondent was illegal.

The learned Agent for the Respondent, for his part, made submissions to the following effect:

1. the Tribunal has no jurisdiction to entertain the application under the Treaty;

2. the premises upon which acquisition of lands was started was on a willing buyer willing seller basis and that the land was to be purchased from white farmers who, by virtue of colonial history, were in possession of most of the land suitable for agricultural purposes;

3. the Respondent continues to acquire land from mainly whites who own large tracts of land suitable for agricultural resettlement and this policy cannot be attributed to racism but to circumstances brought about by colonial history;

4. the Respondent had also acquired land from some of the few black Zimbabweans who possessed large tracts of land;

5. the figures for land required for resettlement were revised from 6 to 11 million hectares. The Applicants' farms were considered for allocation after they had been acquired as part of the land needed for resettlement;

6. the increase in the demand for land resulted in the portions left with the applicants being needed for resettlement;

7. the Applicants will receive compensation under Amendment 17;

8. the compulsory acquisition of lands belonging to Applicants by the Respondent in the context must be seen as a means of correcting colonially inherited land ownership inequities, and

9. the Applicants have not been denied access to the courts. On the contrary, the Applicants could, if they wish to, seek judicial review.

III ISSUES FOR DETERMINATION

After due consideration of the facts of the case, in the light of the submissions of the parties, the Tribunal settles the matter for determination as follows:

- whether or not the Tribunal has jurisdiction to entertain the application;
- whether or not the Applicants have been denied access to the courts in Zimbabwe;
- whether or not the Applicants have been discriminated against on the basis of race, and

- whether or not compensation is payable for the lands compulsorily acquired from the Applicants by the Respondent.

IV JURISDICTION

Before considering the question of jurisdiction, we note first that the Southern African Development Community is an international organization established under the Treaty of the Southern African Development Community, hereinafter referred to as "the Treaty". The Tribunal is one of the institutions of the organization which are established under Article 9 of the Treaty. The functions of the Tribunal are stated in Article 16. They are to ensure adherence to, and the proper interpretation of, the provisions of the Treaty and the subsidiary instruments made thereunder, and to adjudicate upon such disputes as may be referred to it.

The bases of jurisdiction are, among others, all disputes and applications referred to the Tribunal, in accordance with the Treaty and the Protocol, which relate to the interpretation and application of the Treaty – vide

Article 14 (a) of the Protocol. The scope of the jurisdiction, as stated in Article 15 (1) of the Protocol, is to adjudicate upon *"disputes between States, and between natural and legal persons and States"*. In terms of Article 15 (2), no person may bring an action against a State before, or without first, exhausting all available remedies or unless is unable to proceed under the domestic jurisdiction of such State. For the present case such are, indeed, the bases and scope of the jurisdiction of the Tribunal.

The first and the second Applicants first commenced proceedings in the Supreme Court of Zimbabwe, the final court in that country, challenging the acquisition of their agricultural lands by the Respondent.

The claim in that court, among other things, was that Amendment 17 obliterated their right to equal treatment before the law, to a fair hearing before an independent and impartial court of law or tribunal, and their right not to be discriminated against on the basis of race or place of origin, regarding ownership of land.

On October 11, 2007, before the Supreme Court of Zimbabwe had delivered its judgment, the first and second Applicants filed an application for an interim relief, as mentioned earlier in this judgement.

At the hearing of the application, the Respondent raised the issue as to whether the Tribunal has jurisdiction to hear the matter considering that the Supreme Court of Zimbabwe had not yet delivered the judgement and, therefore, that the Applicants had not *"exhausted all available remedies or were unable to proceed under the domestic jurisdiction"*, in terms of Article 15 (2) of the Protocol.

The concept of exhaustion of local remedies is not unique to the Protocol. It is also found in other regional international conventions. The European Convention on Human Rights provides in Article 26 as follows:

> *"The Commission* (of Human Rights) *may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law..."*

Similarly, the African Charter on Human and Peoples' Rights states in Article 50 as follows:

> *"The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving the remedies would have been unduly prolonged".*

Thus, individuals are required to exhaust local remedies in the municipal law of the state before they can bring a case to the Commissions. This means that individuals should go through the courts system starting with the court of first instance to the highest court of appeal to get a remedy. The rationale for exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law before them. It also ensures that the international tribunal does not deal with cases which could easily have been disposed of by national courts.

However, where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies. Further, where, as the African Charter on Human and Peoples' Rights states, *"...it is obvious ... that the procedure of achieving the remedies would have been unduly prolonged"*, the individual is not expected to exhaust local remedies. These are circumstances that make the requirement of exhaustion of local remedies meaningless, in which case the individual can lodge a case with the international tribunal.

In deciding this issue, the Tribunal stressed the fact that Amendment 17 has ousted the jurisdiction of the courts of law in Zimbabwe from any case related to acquisition of agricultural land and that, therefore, the first and second Applicants were unable to institute proceedings under the domestic jurisdiction. This position was subsequently confirmed by the decision of the Supreme Court given on February 22, 2008 in **Mike Campbell (Pty) Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement (SC 49/07).**

The Tribunal also referred to Article 14 (a) of the Protocol, and observed that Amendment 17 had indeed ousted the jurisdiction of the courts of law in that country in respect of the issues that were raised before us, and decided that the matter was properly laid before the Tribunal and, therefore, that the Tribunal had jurisdiction to consider the application for the interim relief.

It will be recalled that the Supreme Court of Zimbabwe delivered its judgment dismissing the Applicants' claims in their entirety, saying, among other things, that the question of what protection an individual should be afforded in the Constitution in the use and enjoyment of private property, is a question of a political and legislative character, and that as to what property should be acquired and in what manner is not a judicial question. The Court went further and said that, by the clear and unambiguous language of the Constitution, the Legislature, in the proper exercise of its powers, had lawfully ousted the jurisdiction of the courts of law from any of the cases in which a challenge to the acquisition of agricultural land may be sought. The Court further stated that the Legislature had unquestionably

enacted that such an acquisition shall not be challenged in any court of law. The Supreme Court, therefore, concluded that there cannot be any clearer language by which the jurisdiction of the courts has been ousted.

Such are the circumstances in which we are to consider the question of jurisdiction. The Respondent first submitted that the Treaty only sets out the principles and objectives of SADC. It does not set out the standards against which actions of Member States can be assessed. The Respondent also contended that the Tribunal cannot borrow these standards from other Treaties as this would amount to legislating on behalf of SADC Member States. The Respondent went on to argue that there are numerous Protocols under the Treaty but none of them is on human rights or agrarian reform, pointing out that there should first be a Protocol on human rights and agrarian reform in order to give effect to the principles set out in the Treaty. The Respondent further submitted that the Tribunal is required to interpret what has already been set out by the Member States and that, therefore, in the absence of such standards, against which actions of Member States can be measured, in the words of its learned Agent, *"the*

Tribunal appears to have no jurisdiction to rule on the validity or otherwise of the land reform programme carried out in Zimbabwe".

In deciding this issue, the Tribunal first referred to Article 21 (b) which, in addition to enjoining the Tribunal to develop its own jurisprudence, also instructs the Tribunal to do so *"having regard to applicable treaties, general principles and rules of public international law"* which are sources of law for the Tribunal. That settles the question whether the Tribunal can look elsewhere to find answers where it appears that the Treaty is silent. In any event, we do not consider that there should first be a Protocol on human rights in order to give effect to the principles set out in the Treaty, in the light of the express provision of Article 4 (c) of the Treaty which states as follows:

> *"SADC and Member States are required to act in accordance with the following principles –*
>
> *(a)* .....
>
> *(b)* .....

(c) human rights, democracy and the rule of law"

It is clear to us that the Tribunal has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law, which are the very issues raised in the present application. Moreover, the Respondent cannot rely on its national law, namely, Amendment 17 to avoid its legal obligations under the Treaty. As Professor Shaw Malcolm in his treatise entitled **International Law** at pages 104-105 aptly observed:

> *"It is no defence to a breach of an international obligation to argue that the state acted in such a manner because it was following the dictates of is own municipal laws. The reason for this inability to put forward internal rules as an excuse to evade international obligation are obvious. Any other situation would permit international law to be evaded by the simple method of domestic legislation".*

This principle is also contained in the Vienna Convention on the Law of Treaties, in which it is provided in Article 27 as follows:

> *"A party may not invoke provisions of its own internal law as justification for failure to carry out an international agreement".*

V ACCESS TO JUSTICE

The next issue to be decided is whether or not the Applicants have been denied access to the courts and whether they have been deprived of a fair hearing by Amendment 17.

It is settled law that the concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation. As indicated already, Article 4 (c) of the Treaty obliges Member States of SADC to respect principles of *"human rights,*

democracy and the rule of law" and to undertake under Article 6 (1) of the Treaty *"to refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty".* Consequently, Member States of SADC, including the Respondent, are under a legal obligation to respect, protect and promote those twin fundamental rights.

As stated in De Smith's **Judicial Review** (6th edition 2007) at paragraph 4-015:

> *"The role of the courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the acts and decisions and orders of public authorities exercising public functions, and to afford protection to the rights of the citizen. Legislation which deprives them of these powers is inimical to the principle of the rule of law, which requires citizens to have access to justice".*

Moreover, the European Court of Human Rights, in **Golder** v **UK (1975) 1 EHRR 524,** at paragraph 34 of its judgement stated as follows:

> *"And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts".*

The same Court held, in **Philis v. GREECE (1991),** at paragraph 59 of its judgement that:

> *"Article 6, paragraph 1 (art. 6-1) secured to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. This right of access, however, is not absolute but may be subject to limitations since the right by its very nature calls for regulation by the State. Nonetheless, the limitations applied must not*

restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired."

The Inter-American Court of Human Rights, in its **Advisory Opinion OC-9/87** of 6 October, 1987, **Judicial Guarantees in States of Emergency (Articles 27 (2), 25 and 8 of the American Convention on Human Rights),** construed Article 27 (2) of the Convention as requiring Member States to respect essential judicial guarantees, such as *habeas corpus* or any other effective remedy before judges or competent tribunals – vide paragraph 41. The Court also considered that Member States were under a duty to provide effective judicial remedies to those alleging human rights violations under Article 25 of the Convention. The Court stated at paragraph 24:

"According to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it

must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective".

The Court also, at paragraph 35 of its judgement, pointed out that the rule of law, representative democracy and personal liberty are essential for the protection of human rights and that *"in a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning".*

The right of access to the courts is also enshrined in international human rights treaties. For instance, the African Charter on Human and Peoples' Rights provides in Article 7 (1) (a) as follows:

"Every individual shall have the right to have his cause heard. This comprises:

(a) *The right to an appeal to competent national organs against acts violating his fundamental rights..."*

The African Commission on Human and Peoples' Rights in its decision in **Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria, Comm.No. 140/94, 141/94 145/95(1999)**, held at paragraph 29 of its judgement that the ouster clauses introduced by the Nigerian military government which prevented Nigerian courts from hearing cases initiated by publishers against the search of their premises and the suppression of their newspapers *"render local remedies non-existent, ineffective or illegal. They create a legal situation in which the judiciary can provide no check on the executive branch of the government"*.

The African Commission on Human and Peoples' Right also in its decision in **Zimbabwe Human Rights NGO Forum/Zimbabwe, Comm.No.245 (2002)**, found that the complainant had been denied access to judicial

remedies since the clemency order introduced to pardon *"every person liable for any politically motivated crime"* had prevented in effect the complainant from bringing criminal action against the perpetrators of such crimes. The Commission began by stating at paragraph 171 of its decision:

> *"The general obligation is on States Parties to the different human rights treaties to ensure through relevant means that persons under their jurisdiction are not discriminated on any of the grounds in the relevant treaty. Obligations under international human rights law are generally addressed in the first instance to States. Their obligations are at least threefold: to respect, to ensure and to fulfill the rights under international human rights treaties. A State complies with the obligation to respect the recognized rights by not violating them. To ensure is to take the requisite steps, in accordance with its constitutional process and the provisions of relevant treaty (in this case the African Charter), to adopt such legislative or other measures which are necessary to give effect to these rights. To fulfill the rights means that any person whose rights*

are violated would have an effective remedy as rights without remedies have little value. Article 1 of the African Charter requires

States to ensure that effective and enforceable remedies are available to individuals in case of discrimination..."

The Commission went on to point out at paragraph 174:

"For there to be equal protection of the law, the law must not only be fairly applied but must be seen to be fairly applied. Paragraph 9 (3) (a) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms provides that everyone must be given the right to complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State,