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Land issues before the SADC Tribunal: A case for human rights?

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1 INTRODUCTION¹

Over the past few decades, land issues have climbed to the top of the agenda in many African countries. These issues are a highly sensitive topic as they reflect African history, on the one hand, and are an indicator for the future development of African states and the African people on the other.

Member states of the Southern African Development Community (SADC) have experienced the whole range of difficulties attached to land issues, with Zimbabwe being an extreme and sad example. In the latter country, a government programme of land redistribution in 2000 resulted in the invasion of largely white-owned farms, accompanied by massive violence tolerated and even encouraged by the Zimbabwean government.

Of course, such developments are of both national and international concern, especially when the issue of land distribution goes hand in hand with human rights violations – as was and is the case in Zimbabwe. Undoubtedly, the issue of land distribution needs to be addressed in a manner that rectifies colonial land distribution and other social injustices such regimes spawned.

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¹ This paper is largely based on OC Ruppel (Forthcoming 2011), ‘SADC land issues before the SADC Tribunal – A case for Human Rights?’ in B Chigara (Ed) *Southern Africa Development Community Land Issues. A New, Sustainable Land Relations Policy* (Routledge, London).

However, this should not be allowed to justify the neglect of national and international human rights standards; in particular, supranational organisations cannot turn a blind eye to states where land redistribution is undertaken in an inhuman and illegal manner. In this context, the concept of *regional integration* plays a vital role in that it strives to harmonise law and jurisprudence, also with regard to human rights.

The case of Zimbabwe has come to the attention of SADC and its judicial organ, the SADC Tribunal, and will continue to be of national and international interest in the near future. Therefore, this chapter intends to introduce SADC, the SADC Tribunal, and their relevance for the protection and promotion of human rights. One specific case (*Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe*²) that relates to the land question and the protection of human rights will be discussed in detail. To put this case in context, the history of land distribution in Zimbabwe will be outlined, with a special emphasis on the legal background to the land reform process that began in 2000. The most recent developments relating to the dispute will be highlighted before showing the legal, political and social consequences that sub-regional jurisdiction may unfold.

It is hoped that land-related human rights violations, such as those that occurred in Zimbabwe, will remain singular instances. Even though the land question always evokes strong passions,³ other SADC countries have shown that inequities related to land issues can be addressed in a more moderate manner to secure peace, stability, democracy, and the rule of law in the region.

The interrelationship between human rights and economic development has become closer over the past few years due to increasing international debate on the issue.⁴ This interconnection is also displayed in the Zimbabwean land question that had to be dealt with before the SADC Tribunal.

² Cf. section 6 herein.

³ B Chigara, *Land Reform Policy: The Challenge of Human Rights Law* (Ashgate Publishing Company, Burlington 2004) xv.

⁴ OC Ruppel, 'Regional Economic Communities and Human Rights in East and Southern Africa' in A Bösl and J Diescho (eds) *Human Rights in Africa* (Macmillan Education Namibia, Windhoek 2009a) 275–319, 279

<http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/9_Ruppel.pdf>

accessed 24 March 2010.

2 THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY – SADC

SADC currently counts 15 states among its members, namely Angola, Botswana, the Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles,⁵ South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. SADC⁶ was established in Windhoek in 1992 as the successor organisation to the Southern African Development Coordination Conference (SADCC), which was founded in 1980. SADC was established by signature of its constitutive legal instrument, the SADC Treaty. SADC envisages

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... a common future, a future in a regional community that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice and peace and security for the peoples of Southern Africa. This shared vision is anchored on the common values and principles and the historical and cultural affinities that exist between the peoples of Southern Africa.

The Regional Indicative Strategic Development Plan (RISDP) approved by the SADC Summit in 2003, has defined the following ambitious targets for regional integration within SADC:

- A Free Trade Area by 2008⁸
- Completion of negotiations of the SADC Customs Union by 2010
- Completion of negotiations of the SADC Common Market by 2015
- SADC Monetary Union and SADC Central Bank by 2016, and
- Launch of a regional currency by 2018.

SADC's overall objectives include the achievement of development and economic growth; the alleviation of poverty; the enhancement of the standard and quality of life; support of the

⁵ The Seychelles was a member of SADC from 1997 to 2004; it rejoined SADC in 2008.

⁶ For more details on SADC, cf. <<http://www.sadc.int/>>.

⁷ Cf. SADC's Vision, at <<http://www.sadc.int/>>.

⁸ COMESA–EAC–SADC/Common Market for Eastern and Southern Africa–East African Community–Southern African Development Community, *Final Communiqué of the COMESA–EAC–SADC Tripartite Summit of Heads of State and Government, held in October 2008 in Kampala, Uganda: Towards a Single Market – Deepening COMESA–EAC–SADC Integration* (2008) Section 14 <http://about.comesa.int/attachments/078_Final_Communique-Kampala_22_10_08.pdf> accessed 18 April 2010.

socially disadvantaged through regional integration; the evolution of common political values, systems and institutions; the promotion and defence of peace and security; and achieving the sustainable utilisation of natural resources and effective protection of the environment.⁹

3 HUMAN RIGHTS PROTECTION WITHIN SADC

It might appear that the promotion and protection of human rights are not SADC's top priority as an organisation that furthers socio-economic cooperation and integration as well as collaboration in respect of politics and security among its 15 southern African member states. However, the protection of human rights plays an essential role in economic development as it has an impact on the investment climate, which in turn contributes to growth, productivity and employment creation, all being essential for sustainable reductions in poverty.

A ministerial workshop in 1994 called for the adoption of a SADC Human Rights Commission as well as for a SADC Bill of Rights. In 1996, a SADC Human Rights Charter was drafted, albeit by non-governmental organisations (NGOs) of several SADC member states. In the course of establishing the SADC Tribunal in 1997, a panel of legal experts¹⁰ considered the possibility of separate human rights instruments such as a Protocol of Human Rights or a separate Southern African Convention on Human Rights. None of these proposals was realised, however.¹¹ Nonetheless, many human-rights-related provisions can be found within SADC's legal framework.

The SADC Treaty itself refers to *regional integration* and *human rights* directly or indirectly at several stages. In its Preamble, the Treaty determines, inter alia, to ensure, through common action, the progress and well-being of the people of southern Africa, and recognises the need to involve the people of the SADC region centrally in the process of development and integration, particularly through guaranteeing democratic rights, and observing human rights and the rule of law. The Preamble's contents are given effect within the subsequent provisions of the SADC Treaty. Chapter 3, for example, which deals with the Treaty's principles, objectives, the

⁹ These are some of the SADC objectives laid down in Article 5 of the SADC Treaty.

¹⁰ This panel consisted of the late Professor W Kamba (founding Dean of the Faculty of Law at the University of Namibia) and Justice F Jacobs (Judge at the Court of Justice of the European Communities). Cf. F Viljoen, 'The Realisation of Human Rights through Sub-regional Institutions' (1999) 7 *African Yearbook of International Law* 185–216, 200.

¹¹ For more details on these historical developments, cf. *ibid.* 200f.

common agenda, and general undertakings, provides that SADC and its member states are to act in accordance with the principles of human rights, democracy and the rule of law.¹² Moreover, the objectives of SADC¹³ relate to human rights issues in one way or another. For instance, the objective of alleviating and eventually eradicating poverty contributes towards ensuring, inter alia, a decent standard of living, adequate nutrition, health care and education – all these being human rights.¹⁴ Other SADC objectives such as the maintenance of democracy, peace, security and stability refer to human rights, as do the sustainable utilisation of natural resources and effective protection of the environment – known as *third-generation* human rights.¹⁵

Besides the aforementioned provisions and objectives, the SADC legal system offers human rights protection in many legal instruments other than the SADC Treaty. One category of legal documents constitutes the SADC Protocols. The Protocols are instruments by means of which the SADC Treaty is implemented; they have the same legal force as the Treaty itself. A Protocol comes into force after two thirds of SADC member states have ratified it. A Protocol legally binds its signatories after ratification. It has been argued that, because there is no particular SADC Protocol on human rights, such issues cannot be brought to the attention of the Tribunal.¹⁶ However, most SADC Protocols¹⁷ are either directly or indirectly relevant to human rights and, in accordance with Article 4(c) of the SADC Treaty, the Tribunal has made it clear that it has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law.¹⁸ Notably, each of these instruments gives guidance to the various SADC

¹² Article 4(c), SADC Treaty.

¹³ Article 5, SADC Treaty.

¹⁴ United Nations Development Programme, *Human Rights and Development: Human Development Report 2000* (United Nations Publications, New York 2000) 8.

¹⁵ OC Ruppel, 'Third-generation Human Rights and the Protection of the Environment in Namibia' in N Horn and A Bösl (eds) *Human Rights and the Rule of Law in Namibia* (Macmillan Namibia, Windhoek 2008a) 101–20 <http://www.kas.de/proj/home/pub/8/2/-/dokument_id-16045/index.html> accessed 28 November 2009.

¹⁶ As argued by the Respondent in *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* SADC (T) Case No. 2/2007 p 23f.

¹⁷ For a list of all SADC Protocols, cf. OC Ruppel, 'Regional Economic Communities and Human Rights in East and Southern Africa' in A Bösl and J Diescho (eds) *Human Rights in Africa* (Macmillan Education Namibia, Windhoek 2009a) 275–319, 293 <http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/9_Ruppel.pdf> accessed 24 March 2010.

¹⁸ *Campbell* (n 21) 25.

institutions within the manifold decision-making processes. In the legal sense, however, only provisions of a binding nature can be enforced.

4 THE SADC TRIBUNAL AND ITS MANDATE

The SADC Tribunal is the judicial institution within SADC. The establishment of the Tribunal was a major event in SADC's history as an organisation as well as in the development of its law and jurisprudence. The Tribunal was established in 1992 by Article 9 of the SADC Treaty as a SADC institution. The legal provisions governing the SADC Tribunal are contained in the SADC Protocol on the Tribunal and the Rules of Procedure thereof (the *Protocol*), which entered into force in 2001. The Protocol comprises 39 Articles¹⁹ and, among other things, establishes the Tribunal and clarifies its functions. According to Article 23 of the Protocol, the Rules of Procedure (the *Rules*) form an integral part of the Protocol. These Rules comprise 90 regulations governing, inter alia, the constitution and functions of the Tribunal; representation before the Tribunal; written, oral and special proceedings; and decisions.

5 THE ZIMBABWEAN LAND QUESTION

Since its independence in 1980 and until 2000, Zimbabwe was a relatively peaceful, stable and generally tolerant country.²⁰ However, since 2000, in the Zimbabwe government's redress of unequal land situation, white farmers found – and are still finding – themselves being victims of farm invasions and farm seizures that mirror the land seizures of the colonial period. Under the Lancaster House Constitution, the Zimbabwean government was constrained to protect white property ownership through the “willing seller – willing buyer” principle, and compensation for land had to be paid in foreign currency. In those days, the only underutilized land was permitted to be expropriated, subject to compensation at full market value. After the expiry of the Lancaster House guarantees in 1990, the Zimbabwean government was prepared to make its land reform programme more effective. Thus, the Land Acquisition Act 1992 was promulgated and various amendments were made to the Constitution to allow for the acquisition of land by government for resettlement purposes. This Act empowered the President of Zimbabwe to

¹⁹ It has to be noted, however, that Articles 35 and 36 (ratification and accession, respectively) of the Protocol have been repealed by the Agreement Amending the Protocol on the Tribunal. The latter Agreement entered into force in October 2002; hereafter *SADC Protocol*.

²⁰ Save for the massacres in Matebeleland in 1980–1987, in which the Zimbabwean government caused the death of 20,000 civilians and the disappearance of thousands more.

acquire any land where it was reasonably necessary for purposes set out in it. The process led to a new elite of black farmers, with little or no improved access to land for the majority of the population.²¹

At the beginning of 2000, the ruling ZANU–PF²² party found its popularity declining rapidly due to a deteriorating economic situation which, in turn, was due largely to the government’s reckless economic policies and rampant corruption. As a result, the party suffered a resounding defeat in the constitutional referendum held on 11 and 12 February 2000. The referendum defeat triggered a spate of violent farm occupations. From mid-March 2000 onwards, hundreds of commercial farms were invaded by “war veterans”, i.e. people who were alleged to be veterans of Zimbabwe’s liberation war, but who were in fact mostly unemployed youths not old enough to have been part of that war. Indeed, these farm invasions were not a spontaneous demonstration by landless people against inequitable land distribution in Zimbabwe. There is overwhelming evidence that high-ranking ZANU–PF members were actively involved in implementing the invasions, together with intelligence and army personnel, and that they formed part of a political strategy to combat the growing influence of the opposition MDC²³ party and to win back rural support by using the promise of land resettlement and crude violence.²⁴

The 2000 referendum defeat led to the radical process of land occupation by means of governmental exploitation of the racial divide in land distribution. The historical incidents of the fight for political freedom and the aggravating rhetoric of ‘they stole our land’²⁵ was paired with the peasant’s legitimate need for land and the failure of the British government and other donors

²¹ Crisis in Zimbabwe Coalition, *Zimbabwe Report* (2002) <[http://ocha-gwapps1.unog.ch/rw/RWFiles2002.nsf/FilesByRWDocUNIDFileName/OCHA-64DB46-czc-zim-20jun.pdf/\\$File/czc-zim-20jun.pdf](http://ocha-gwapps1.unog.ch/rw/RWFiles2002.nsf/FilesByRWDocUNIDFileName/OCHA-64DB46-czc-zim-20jun.pdf/$File/czc-zim-20jun.pdf)> accessed 5 April 2010.

²² Zimbabwe African National Union–Patriotic Front.

²³ Movement for Democracy and Change.

²⁴ Crisis in Zimbabwe Coalition, *Zimbabwe Report* (2002) <[http://ocha-gwapps1.unog.ch/rw/RWFiles2002.nsf/FilesByRWDocUNIDFileName/OCHA-64DB46-czc-zim-20jun.pdf/\\$File/czc-zim-20jun.pdf](http://ocha-gwapps1.unog.ch/rw/RWFiles2002.nsf/FilesByRWDocUNIDFileName/OCHA-64DB46-czc-zim-20jun.pdf/$File/czc-zim-20jun.pdf)> accessed 5 April 2010.

²⁵ WH Shaw, “‘They Stole Our Land’: Debating the Expropriation of White Farms in Zimbabwe” (2003) 41 *Journal of Modern African Studies* 75–89.

to live up to their compensation promises.²⁶ Justified under nationalist dogma, the Zimbabwean government from then on supported violent farm invasions that occurred in negligent (if not intentional) violation of the law. Farm invasions were accompanied by the compulsory acquisition of commercial farms, which was increasingly unfair and arbitrary. The land programme itself has been accompanied by considerable violence, leading to the unlawful eviction of farmers and their workers. Approximately 95 per cent of commercial farms have been seized or are in the process of being seized. Moreover, as stated previously, many beneficiaries of the land programme are not landless peasants but Ministers, other senior government officials, and prominent supporters of the ruling party.²⁷

Section 23 of the Constitution of Zimbabwe states as follows:

No law shall make any provision that is discriminatory either of itself or in its effect; and no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

In 2005, however, the Constitution was amended. The Constitutional Amendment (No. 17) Act 2005 allows the government to seize or expropriate farmland without compensation, and it bars courts from adjudicating over legal challenges filed by dispossessed and aggrieved farmers. Section 2(2) of the Amendment Act provides that –

... all agricultural land – [a description is given here of such agricultural land identified by the government] ... is acquired by and vested in the State with full title therein ...; and ... no compensation shall be payable for land referred to in Paragraph (a) except for any improvements effected on such land before it was acquired.

The practical implications of the Amendment Act resulted in farm seizures, where the majority of the approximately 4,000 white farmers were forcibly ejected from their properties with no

²⁶ M Dube and R Midgley, 'Land Reform in Zimbabwe: Context, Progress, Legal and Constitutional Issues and Implications for the SADC Region' in A Bösl, W Breytenbach, T Hartzenberg and others (eds) *Monitoring Regional Integration in Southern Africa: Yearbook Vol. 8* (Trade Law Centre for Southern Africa, Stellenbosch 2008) 303–42.

²⁷ Crisis in Zimbabwe Coalition, *Zimbabwe Report* (2002) <[http://ocha-gwapps1.unog.ch/rw/RWFiles2002.nsf/FilesByRWDocUNIDFileName/OCHA-64DB46-czc-zim-20jun.pdf/\\$File/czc-zim-20jun.pdf](http://ocha-gwapps1.unog.ch/rw/RWFiles2002.nsf/FilesByRWDocUNIDFileName/OCHA-64DB46-czc-zim-20jun.pdf/$File/czc-zim-20jun.pdf)> accessed 5 April 2010.

compensation being paid for the land. The only compensation the government paid was for developments on the land such as dams, farm buildings and other improvements.

Apparently, at this stage, Zimbabwean land reform programme has gone into reverse gear. It has been revealed that some beneficiaries of the land reform programme - including traditional and political leaders - are reengaging white farmers as farm managers or even leasing out their farms to the farms' white former owners. Zimbabwe's President Robert Mugabe himself has openly criticised new farmers for taking land when they knew they could not farm.²⁸ Thus, in March 2010, Zimbabwean Government has confirmed that it will re-demarcate land allocated to farmers who are failing to attain optimum production owing to resource constraints by way of rationalising the allocations so that people have pieces of land they can fully use.²⁹

6 *MIKE CAMPBELL (PVT) LTD V THE REPUBLIC OF ZIMBABWE*

On 11 October 2007, Mike Campbell (Pvt) Ltd,³⁰ a Zimbabwean-registered company, instituted a case with the SADC Tribunal to challenge human rights violations by the expropriation of agricultural land in Zimbabwe by that country's government.³¹ Mike Campbell had purchased

²⁸ T Mudiwa, 'Mugabe Attacks Zimbabwe's Land Reform Again' *ZimDaily* (Harare 23 March 2010) <<http://www.zimdaily.com/beta/news271338.html>> accessed 10 April 2010.

²⁹ In an interview with the Zimbabwean newspaper *The Herald*, the Mashonaland Central Provincial Governor, Advocate Martin Dinha, said some farms were too big for occupiers to cope with. Cf. *The Herald* (Harare 19 March 2010) <http://cfuzim.org/index.php?option=com_content&view=article&id=449:govt-to-rationalise-farm-sizes&catid=51:newspaper-clippings&Itemid=92> accessed 10 April 2010.

³⁰ *Campbell* (n 21).

³¹ For more information, cf. OC Ruppel, 'Regional Economic Communities and Human Rights in East and Southern Africa' in A Bösl and J Diescho (eds) *Human Rights in Africa* (Macmillan Education Namibia, Windhoek 2009a) 275–319 <http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/9_Ruppel.pdf> accessed 24 March 2010; OC Ruppel, 'The Southern African Development Community (SADC) and its Tribunal: Reflexions on Regional Economic Communities' Potential Impact on Human Rights Protection (2009) 2 *Verfassung und Recht in Übersee* (Nomos, Baden-Baden 2009b) 173–86; OC Ruppel, 'The SADC Tribunal, Regional Integration and Human Rights: Major Challenges, Legal Dimensions and Some Comparative Aspects from the European Legal Order' (2009) 2 *Recht in Afrika* (Köppe Verlag, Köln 2009c) 213–38; OC Ruppel, 'Das SADC Tribunal: Eine Juristische Zwischenbilanz' *Allgemeine Zeitung* (Windhoek 5 February 2009) <<http://www.az.com.na/afrika/das-sadc-tribunal-eine-juristische->

the farm in question on the open market in 1980 – after Zimbabwe’s Independence. In 1997, the property was listed for acquisition as part of the government’s land reform programme.

In July 2001, the government made an initial attempt to seize the Campbell farm without paying compensation. At first, the High Court of Zimbabwe declared such acquisitions to be invalid.³² However, in September and October 2001, the property was invaded by so-called war veterans – ZANU–PF’s informal paramilitary wing – for the first time. The aforementioned Amendment Act eliminating judicial recourse or remedy for farmers who wished to object to the acquisition of their farms came into effect on 14 September 2005. In 2006, Campbell opposed an attempt to allocate the farm to the former Minister for Land, Land Reform and Resettlement, Nathan Shamuyarira. On 15 May 2006, Campbell instituted legal proceedings in the Supreme Court of Zimbabwe in order to halt his eviction from the farm by way of challenging the constitutional validity of the Amendment Act. As the Supreme Court did not rule on the matter within a reasonable period of time, on 11 October 2007, the applicants approached the SADC Tribunal. Thus, the *Campbell* case became a benchmark of the SADC Tribunal’s key role in the integration of legal and institutional systems in its region of jurisdiction.

6.1 The 2007 interim order

In 2007, an application was brought before the SADC Tribunal in terms of Article 28 of the SADC Protocol for an interim measure to prohibit the Zimbabwean government from evicting Mike Campbell (Pvt) Ltd and others from the land in question until the main case had been finalised.

In one of the Tribunal’s first hearings, the issue of non-exhaustion of local remedies was raised. In this context it is worth noting that the new Section 16B of the Zimbabwean Constitution, which is the creation of the said Amendment Act, deprives affected landowners of their right to

zwischenbilanz.80234.php> accessed 9 September 2009; and OC Ruppel and F-X Bangamwabo, ‘The Mandate of the SADC Tribunal and its Role for Regional Integration’ in A Bösl, W Breydenbach, T Hartzenberg and others (eds) *Yearbook for Regional Integration* (Trade Law Centre for Southern Africa, Stellenbosch 2008) 179–221
<http://www.tralac.org/cause_data/images/1694/MRI2008WithCover20090415.pdf> accessed 25 November 2009.

³² *Commercial Farmers’ Union v Minister of Lands, Agriculture and Resettlement* 2001 (2) SA 925 (ZSC).

seek remedy within domestic courts.³³ In fact, when the applicants in this case approached the SADC Tribunal seeking an interim order in terms of Article 28 of the Protocol as read with Rule 61(2) and (5) of its Rules of Procedure, the respondent state argued that the application had not been properly placed before the Tribunal in that the applicants had not exhausted local remedies in terms of Article 15(2) of the Protocol.³⁴

When the matter was filed with the Tribunal in October 2007, the Supreme Court of Zimbabwe, sitting as a Constitutional Court, was still dealing with the constitutional challenge of Section 16B of the Zimbabwean Constitution brought by the same applicants as in the *Campbell* case.³⁵ The relief being sought from the highest court in Zimbabwe was similar to that which the applicants sought from the SADC Tribunal. However, the Tribunal held as follows:

Referring to the issue of failure to exhaust local remedies by 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 applicants are seeking an interim measure of protection pending the final determination of the matter.³⁶

The claimant argued that the Zimbabwean land acquisition process was racist and illegal by virtue of Article 6 of the SADC Treaty and the African Union Charter, both of which outlaw arbitrary and racially motivated government action. Article 4 of the SADC Treaty requires SADC and its member states to, among other things, act in accordance with the principles of human rights, democracy, and the rule of law, as well as with the principles of equity, balance and mutual benefit, and the peaceful settlement of disputes. According to Article 6(2) of the SADC Treaty, ‘SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability’.

³³ Section 16B(3) of the Zimbabwean Constitution reads as follows: ‘... a person having any right or interest in the land (expropriated land) shall not apply to court to challenge the acquisition of the land by the state, and no court shall entertain such challenge ...’.

³⁴ *Campbell*; Interim order dated 13.12.2007, p 6.

³⁵ *Mike Campbell (Pvt) Ltd v The Minister of National Security responsible for Land, Land Reform and Resettlement and the Attorney-General*, Constitutional Application No. 124/06 (unreported case: Supreme Court of Zimbabwe).

³⁶ *Campbell*; Interim order dated 13 December 2007.

It was put forward by Campbell that the constitutional amendments behind the farm seizures were contrary to SADC statutes, and that the Supreme Court of Zimbabwe had failed to rule on an application by Campbell and 74 other Zimbabwean white commercial farmers to have the race-based acquisition declared unlawful.³⁷

On 13 December 2007, the SADC Tribunal ruled that Campbell should remain on his expropriated farm until the dispute in the main case had been resolved by the Tribunal:

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 its orders, to evict from or interfere with the peaceful residence on and beneficial use of the farm known as Mount Campbell in the Chetugu District in Zimbabwe, by Mike Campbell (Pvt) Ltd and William M Campbell, their employees and the families of such employees and of William Michael Campbell.³⁸

On 22 January 2008, the Zimbabwean Supreme Court dismissed the application by the white commercial farmers challenging the forcible seizure and expropriation of their lands without compensation. The court ruled that ‘by a fundamental law, the legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded’.³⁹ The court further ruled that the 2005 Constitutional Amendment was valid and, therefore, constitutional in that its purpose was to acquire the land for public use.

On 23 January 2008, the Zimbabwean government announced that it would seize the farm. Land Reform Minister Dydimus Mutasa said the farm would be handed over to a black owner as part of state land reforms, and in accordance with the ruling by the Zimbabwean Supreme Court.⁴⁰

³⁷ D Grebe, ‘Klagerschar vervielfacht – 74 simbabwische Farmer dürfen mit Campbell Enteignung anfechten’ *Allgemeine Zeitung* (Windhoek 31 March 2008).

³⁸ Cf. *Campbell*, Interim order 13.12.2007. This interim relief was also applied for by and granted to other applicants/intervenors on 28 March 2008; cf. cases SADC (T) 03/08, 04/08 and 06/08.

³⁹

Cf.

<http://www.thezimbabwean.co.uk/index.php?option=com_content&view=article&id=13001:campbell-case-heads-of-argument-summary&catid=31:top%20zimbabwe%20stories&Itemid=66> accessed 10 April 2010.

⁴⁰ Cf. also M Dube and R Midgley, ‘Land Reform in Zimbabwe: Context, Progress, Legal and Constitutional Issues and Implications for the SADC Region’ in A Bösl, W Breytenbach, T Hartzenberg

6.2 The 2008 urgent application and application for intervention

The main hearing before the SADC Tribunal originally scheduled for 28 May 2008 was postponed until 16 July 2008. In the meantime, the claimant, Campbell, and members of his family were brutally beaten up on their farm in Zimbabwe and allegedly forced to sign a paper declaring that they would withdraw the case from the SADC Tribunal.⁴¹ On 18 July 2008, applicants and other interveners in the *Campbell* case made an urgent application to the Tribunal seeking a declaration to the effect that the respondent state was in breach and contempt of the Tribunal's orders. After hearing the urgent application, the Tribunal found that the respondent state was indeed in contempt of its orders. Consequently, and in terms of Article 32(5) of the Protocol, the Tribunal decided to report the matter to the Summit for the latter to take appropriate action.

Meanwhile, a significant number of recently resettled indigenous farmers had filed an application seeking an order to allow them to intervene in the main case.⁴² This more recent application was, however, dismissed with costs. In the Tribunal's view, the latter applicants/interveners could not be allowed to intervene in the main case for the following reasons: the application had been filed out of time and no good reason had been advanced to justify the inordinate delays;⁴³ the alleged dispute in the present application was between present applicants and applicants in the main case (*Campbell* case), and not between persons (either natural or juristic) and a state;⁴⁴ and the applicants had failed to demonstrate any legal right or

and others (eds) *Monitoring Regional Integration in Southern Africa: Yearbook Vol. 8* (Trade Law Centre for Southern Africa, Stellenbosch 2008) 303–42.

⁴¹ D Grebe, 'Simbabwe: Brutaler Überfall auf Campbell – Schlägertrupps misshandeln Farmerfamilie schwer und erpressen Verzichtserklärung für Prozess am SADC Tribunal' *Allgemeine Zeitung* (Windhoek 1 July 2008) <<http://www.az.com.na/afrika/simbabwe-brutaler-berfall-auf-campbell.69175.php>> accessed 10 April 2010.

⁴² Cf. *Nixon Chirinda v Campbell (Pvt) Ltd and The Republic of Zimbabwe* SADC (T) 1, 17 September 2008.

⁴³ Rule 70(2) of the Tribunal provides that an 'application in terms of this Rule (application to intervene) shall be made as soon as possible and not later than the closure of the written proceedings in the main case ...'.

⁴⁴ The Tribunal based its reasoning on the content of Article 15(1) of the Protocol, which reads as follows: 'The Tribunal shall have jurisdiction over disputes between States, and between natural or legal

interests which were likely to be prejudiced or affected by the Tribunal's decision in the *Campbell* case.⁴⁵

6.3 The 2008 final ruling

The hearing of the *Campbell* case was finalised on 28 November 2008. The SADC Tribunal in its final decision ruled in favour of the applicants Mike and William Campbell and 77 other white commercial farmers.⁴⁶ In conclusion, the Tribunal held that the Republic of Zimbabwe was in breach of its obligations under Articles 4(c) and 6(2) of the SADC Treaty and that the applicants had been denied access to the courts in Zimbabwe;⁴⁷ the applicants had been discriminated against on the ground of race;⁴⁸ and fair compensation had to be paid to the applicants for their lands compulsorily acquired by the Republic of Zimbabwe.

The Tribunal further directed the Republic of Zimbabwe to take all necessary measures to protect the possession, occupation and ownership of the lands of those applicants who had not yet been evicted from their lands, and to pay fair compensation to those who had already been evicted. The ruling is considered to be a landmark decision which will, without any doubt, influence the legal landscape in the SADC region.⁴⁹

persons and States'. Thus, where a dispute involves only persons (either natural or juristic), the Tribunal is not competent to adjudicate it.

⁴⁵ The Tribunal further held that the applicants/interveners had failed to adduce any evidence showing that they had indeed been denied access to justice and had suffered racial discrimination or loss. Cf. *Nixon Chirinda*.

⁴⁶ *Campbell* (n 21).

⁴⁷ *Campbell* (n 21) 57f.

⁴⁸ The issue of racial discrimination was decided by a majority of 4 to 1. Judge OB Tshosa, in his dissenting opinion, concluded that 'Amendment 17 does not discriminate against the applicants on the basis of race and therefore does not violate the respondent obligation under Article 6(2) of the Treaty'. He argues that 'the target of Amendment 17 is agricultural land and not people of a particular racial group and that – although few in number – not only white Zimbabweans have been affected by the amendment'. Cf. *Campbell*, dissenting opinion of Hon. Justice Dr Onkemetse B. Tshosa.

⁴⁹ Cf. OC Ruppel, 'Das SADC Tribunal: Eine Juristische Zwischenbilanz' *Allgemeine Zeitung* (Windhoek 5 February 2009) <<http://www.az.com.na/afrika/das-sadc-tribunal-eine-juristische-zwischenbilanz.80234.php>> accessed 9 September 2009.

6.4 The 2009 urgent application

Despite the rule that the Tribunal's decisions are final and binding,⁵⁰ at the beginning of 2009 the Zimbabwean government announced that it would not accept the Tribunal's judgement in the *Campbell* case.⁵¹ Subsequently, the farm of Michael Campbell, who had won the case at the SADC Tribunal, was invaded.⁵² This raised the question of how the Tribunal's judgements were to be enforced. Sanctions for non-compliance may be imposed by the Summit, according to Article 33 of the SADC Treaty, and are determined on a case-by-case basis. However, no specific sanction is outlined for non-compliance with judgements issued by the Tribunal.⁵³ The Tribunal itself can only refer cases of non-compliance to the Summit for the latter to take appropriate steps.

On 7 May 2009, an urgent application was filed with the Tribunal, seeking, in substance, a declaration to the effect that the respondent was in breach and contempt of the Tribunal's decision of 28 November 2008 in the *Campbell* matter. In its decision on 5 June 2009,⁵⁴ the Tribunal noted 'that the respondent has not taken part in the proceedings since, as learned Counsel for the respondent has put it, he lacks instructions from the respondent'. The Tribunal further held that 'the applicants have adduced enough material to show that the existence of a

⁵⁰ SADC Treaty, Article 16(5).

⁵¹ On 28 February 2009, Zimbabwe's President Robert Mugabe said that '[t]here is no going back on the land reforms', and that '[s]ome formers went to the SADC tribunal in Namibia but that's nonsense, absolute nonsense, no one will follow that ... We have courts here in this country, that can determine the rights of people. Our land issues are not subject to the SADC tribunal' (*The Namibian*, 2 March 2009, 'Mugabe says Zim land grabs will continue').

⁵² On 25 February 2009, Michael Campbell and his wife had to leave the farm in fear of their safety after a group of two vehicles led by Peter Chamada, nephew of Cabinet Minister Nathan Shamuyarira, claiming to be from the Lands Office, came to the farm and said that they did not care about the law or the police, and that they had come to take over the land. Cf. *The Namibian*, 27 February 2009, 'Campbell flees farm invasion in Zimbabwe'.

⁵³ Interestingly, a draft SADC Human Rights Charter drawn up by NGOs of SADC member states in 1996 contained a provision according to which any state 'which does not comply with an order of the Court interpreting this Charter shall be suspended from SADC for the duration of its non-compliance with such order'. This proposal, although it appears very effective, has, however, not been realised. Cf. F Viljoen, 'The Realisation of Human Rights through Sub-regional Institutions' (1999) 7 *African Yearbook of International Law* 185–216.

⁵⁴ *Campbell v The Republic of Zimbabwe*, SADC (T) 03/2009 [2009] SADC (T) 1 (5 June 2009).

failure on the part of the respondent and its agents to comply with the decision of the Tribunal has been established'. In this regard, the Tribunal referred, among other things, to the Deputy Attorney-General's letter addressed to Messrs Gollop and Blank, Legal Practitioners, dated 18 December 2008, which states that '... the policy position taken by the Government to the judgment handed down by the SADC Tribunal on the 28th November, 2008 is that all prosecutions of defaulting farmers under the provisions of the Gazetted Lands (Consequential Provisions) Act should now be resumed'; to the speech delivered on 12 January 2009 in Bulawayo, Zimbabwe, by the Deputy Chief Justice at the opening of the 2009 legal year, in the course of which speech he stated, among other things, that the Tribunal lacked jurisdiction to hear and determine the *Campbell* case; and to the fact that President Robert Mugabe, in the course of his birthday celebrations, qualified the Tribunal's decision as 'nonsense' and 'of no consequence'.⁵⁵

The Tribunal, presided over by the newly appointed Justice Ariranga Govindasamy Pillay,⁵⁶ the former Chief Justice of Mauritius, concluded that all of the above statements had been followed

⁵⁵ Ibid. On 26 January 2010, the Zimbabwean High Court ruled that the Tribunal's decision could not be enforced at national level as this would be in contradiction to the Constitution of Zimbabwe. See *Gramara (Pvt) Ltd and Colin Bailie Cloete v The Government of the Republic of Zimbabwe*, High Court of Zimbabwe decision dated 26 January 2010.

⁵⁶ Hon. Justice AG Pillay is also the Vice-Chairperson of the Committee on Economic, Social and Cultural Rights (CESCR); cf. <<http://www.unhcr.ch/tbs/doc.nsf/bf12f8158bdd1ce4c1256a4d002dfbc7/80256404004ff315c12563ef002df626?OpenDocument>> accessed 15 June 2009. The CESCR is a body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by its states parties. The CESCR was established under United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 in 1985 to carry out the monitoring functions assigned to ECOSOC in Part IV of the Covenant. Within two years of having acceded to the ICESCR, all states parties are obliged to submit an initial report to the Committee on how these rights are being implemented. Regular reports are also required every five years after that. The Committee examines each report and addresses its concerns and recommendations to the state party in question in the form of 'concluding observations'. With regard to individual complaints, on 10 December 2008, the General Assembly unanimously adopted an Optional Protocol (GA Resolution A/RES/63/117) to the ICESCR which empowers the Committee to receive and consider communications. The General Assembly took note of the adoption of the Optional Protocol by the Human Rights Council by its Resolution 8/2 of 18 June 2008. For more information, cf. <<http://www2.ohchr.org/english/bodies/cescr/>> accessed 15 June 2009.

by invasion of the applicants' lands, and their intimidation and prosecution. Consequently, pursuant to Article 32(5) of the Protocol, the Tribunal decided to report its finding to the Summit for the latter to take appropriate action.⁵⁷ To date, Zimbabwe has not been censured by the Summit over its controversial land reform programme.

6.5 Aftermaths and current legal developments

It has been demonstrated, that the issue of land reform in Zimbabwe has been subject to the SADC Tribunal's jurisdiction. The Tribunal has declared that Amendment 17 is in breach of Article 4(c) and 6(2)⁵⁸ of the SADC Treaty. However, the issue is far from being closed as will briefly be outlined in the following. Despite the Tribunal's rulings in the Campbell case, seizures of white-owned farms have continued. The Campbell farm has been robbed on numerous occasions and in August and September 2009, the homesteads of Mike Campbell and his son-in-law Ben Freeth, respectively, were destroyed by fire.⁵⁹

Despite Zimbabwe's refusal to adhere to the Tribunal's ruling, white farmers have continued to take all necessary legal steps to enforce it. An application to have the ruling registered in Zimbabwe as a prerequisite for enforcement on a national level was dismissed by Judge Barack Patel of the Zimbabwean High Court. He argued that the decisions were not registrable or enforceable in terms of Chapter 8:02 of the Civil Matters (Mutual Assistance) Act, which contains the relevant statutory provisions presently in force in Zimbabwe for the registration of foreign civil judgments, as 'the Tribunal had not been specifically designated under the Act'.⁶⁰ Furthermore, registration and consequent enforcement of the Tribunal's judgment would be fundamentally contrary to the Zimbabwean Constitution and public policy, and that, compared

⁵⁷ D Grebe, 'Zweiter Sieg für weiße Farmer. SADC-Tribunal: Simbabwe missachtet Urteil – Gipfel soll Konsequenzen prüfen' *Allgemeine Zeitung* (Windhoek 9 June 2009).

⁵⁸ It must be noted that different views exist on this issue. The decision that Amendment 17 is in breach of Article 6(2) of the SADC Treaty was not an unanimous decision. Cf the dissenting opinion in the *Campbell* case by Hon. Justice Dr Onkemetse B. Tshosa.

⁵⁹ Cf. J Raath, 'Activists Mike Campbell and Ben Freeth's Farms "Set Alight by Henchmen"' *Times online* (Harare 3 September 2009) <<http://www.timesonline.co.uk/tol/news/world/africa/article6819284.ece>> accessed 25 March 2010.

⁶⁰ See *Gramara (Pvt) Ltd and Colin Bailie Cloete v The Government of the Republic of Zimbabwe*, High Court of Zimbabwe decision dated 26 January 2010 at page 6. Text available at <http://www.kubatana.net/docs/landr/high_court_patel_gramara_goz_100126.pdf> accessed 8 June 2010.

with the number of applicants before the Tribunal, a much greater number of Zimbabweans shared –

... the legitimate expectations that the Government will effectively implement the land reform programme and fulfil their aspirations thereunder. Given these countervailing expectations, public policy as informed by basic utilitarian precept would dictate that the greater public good must prevail.⁶¹

On 25 February 2010, the North Gauteng High Court in Pretoria, with respect to the same matter, however, ordered that the rulings by the Tribunal delivered on 28 November 2008 and 5 June 2009 against the seizure of farms in Zimbabwe were declared to be registered, i.e. recognized and enforceable in terms of Article 32 of the Protocol on the SADC Tribunal by the High Court of South Africa.⁶² The latter order will obviously put severe political pressure on both the governments of South Africa and Zimbabwe as it opens the door to the seizure of Zimbabwean government assets. Zimbabwe's farmers intend to seize Zimbabwean property in South Africa⁶³ to recover their legal costs, which constitutes a precedent as such.⁶⁴ As the Zimbabwean government had not contested in the aforementioned High Court ruling, there seems no way for that government to appeal against the order. On 26 November 2009, the same High Court had already made an order in terms of which the South African government undertook to respect and honour the judgments by the Tribunal in favour of commercial farmers in Zimbabwe, and to uphold the rights and remedies of victims of Zimbabwe's unlawful land expropriation exercise.

⁶¹ *Gramara (Pvt) Ltd and Colin Bailie Cloete v The Government of the Republic of Zimbabwe*, High Court of Zimbabwe decision dated 26 January 2010 Text available at <http://www.kubatana.net/docs/landr/high_court_patel_gramara_goz_100126.pdf> accessed 8 June 2010.

⁶² *Louis Karel Fick v The Government of the Republic of Zimbabwe* Case No. 77881/2009. Order by Judge G Rabie, High Court of South Africa (North Gauteng High Court, Pretoria).

⁶³ Several properties owned by the Zimbabwean government have been identified, including houses in Cape Town. Unlike properties in Pretoria which are connected to the embassy, the Cape Town properties are thought not to be protected by diplomatic immunity. Cf. P Thornycroft and S Berger, 'Zimbabwe's White Farmers Plan to Seize Government Property', *Telegraph* (Harare/Johannesburg 7 March 2010) <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/7386395/Zimbabwes-white-farmers-plan-to-seize-government-property.html>> accessed 18 March 2010.

⁶⁴ *Ibid.*

On 12 February 2010, Zimbabwean farmers who had lost their farms, the Zimbabwe Commercial Farmers' Union and the Southern African Commercial Farmers' Union instituted an urgent legal action at the SADC Tribunal claiming that the Zimbabwean government was in continued breach, defiance and contempt of the SADC Treaty and of the Tribunal's rulings. The applicants seek that the Zimbabwean Government be referred to the SADC Summit for possible suspension or expulsion from SADC.

7 CONCLUSION

The Zimbabwean land issue is not only a reflection of the unresolved question of 'how States resolve past and continuing social injustices that are rooted in colonial or some such other similar experience ...':⁶⁵ it is also a reflection of land reform per se being understood as the transfer of land from one owner or group of owners to another for political, social, or ideological purposes.

Amendment 17 of the Zimbabwean Constitution has been challenged before the SADC Tribunal. On the one hand, the Zimbabwean constitutional amendments shifted the responsibility for the payment of compensation for compulsorily acquired farms to Britain as the former colonial power.⁶⁶ Arbitrarily, on the other hand, Zimbabwe fails to take the full responsibility for its actions by way of not recognising the SADC Tribunal's rulings, claiming the country has been fully recognised as a sovereign state.

So far, the SADC Tribunal's position is considered to be rather weak, especially due to its lack of enforcement mechanisms and – perhaps more importantly – a lack of protest by other SADC member states against Zimbabwe's persistent non-compliance with the Tribunal's judgments.

⁶⁵ B Chigara, *Land Reform Policy: The Challenge of Human Rights Law* (Ashgate Publishing Company, Burlington 2004) 1.

⁶⁶ Cf. Section 16A(2) of the Constitution of the Republic of Zimbabwe. For further references, cf. M Dube and R Midgley, 'Land Reform in Zimbabwe: Context, Progress, Legal and Constitutional Issues and Implications for the SADC Region' in A Bösl, W Breytenbach, T Hartzenberg and others (eds) *Monitoring Regional Integration in Southern Africa: Yearbook Vol. 8* (Trade Law Centre for Southern Africa, Stellenbosch 2008) 313.