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**
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, which should render their decision on the complaint without undue delay".

It is useful, finally, to refer to the decision of the Constitutional Court of South Africa in **Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC).** The Court found that certain provisions of the Pound Ordinance of 1947 of KwaZulu-Natal which allowed landowners to bypass the courts and recover damages against the owners of trespassing animals were inconsistent with section 34 of the Constitution which guarantees the right of access to courts.

At paragraph 82 of the judgement, Ngcobo J. made the following pertinent observations:

"The right of access to courts is an aspect of the rule of law. And the rule of law is one of the foundational values on which our constitutional democracy has been established. In a constitutional democracy founded on the rule of law, disputes between the state and its subjects, and amongst its subjects themselves, should be adjudicated upon in accordance with law. The more potentially divisive the conflict is, the more important that it be adjudicated upon in court. That is why a constitutional democracy assigns the

resolution of disputes to "a court or, where appropriate, another independent and impartial tribunal or forum'. It is in this context that the right of access to courts guaranteed by section 34 of the Constitution must be understood".

The right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation is another principle well recognized and entrenched in law.

Any existing ouster clause in terms such as *"the decision of the Minister shall not be subject to appeal or review in any court"* prohibits the court

from re-examining the decision of the Minister if the decision reached by him was one which he had jurisdiction to make. Any decision affecting the legal rights of individuals arrived at by a procedure which offended against natural justice was outside the jurisdiction of the decision-making authority so that, if the Minister did not comply with the rules of natural justice, his decision was *ultra vires* or without jurisdiction and the ouster clause did not prevent the Court from enquiring whether his decision was valid or not

– vide **Attorney-General of the Commonwealth of the Bahamas v Ryan (1980) A.C. 718.**

Lord Diplock for the Board of the Judicial Committee of the Privy Council stated in that case as follows:

> *"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. As Lord Selborne said as long ago as 1885 in* ***Spackman v Plumstead District Board of Works*** *(1885) 10*

App.Cas.229,240: *"There would be no decision within the meaning of the statute if there were anything…done contrary to the essence of justice". See also* ***Ridge v. Baldwin [1964] A.C.40".***

Moreover, in **Jackson v Attorney-General UKHL 56 (2006) 1 A.C. 262**, Baroness Hale made the following observations at paragraph 159:

"The courts, will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny".

We turn now to consider the relevant provisions of Amendment 17. It is quite clear that the provisions of section 18 (1) and (9) dealing with the constitutional right to the protection of law and to a fair hearing have been taken away in relation to land acquired under section 16B (2) (a). Indeed, the Supreme Court of Zimbabwe explicitly acknowledges this in its judgement, cited above, when it stated:

> *"By the clear and unambiguous language of s 16B (3) of the Constitution, the Legislature, in the proper exercise of its powers, has ousted the jurisdiction of courts of law from any of the cases in which a challenge to the acquisition of agricultural land secured in terms of s 16B (2) (a) of the Constitution could have been sought. The right to protection of law for the enforcement of the right to fair compensation in case of breach by the acquiring authority of the obligation to pay compensation has not been taken away. The ouster provision is limited in effect to providing protection from judicial process to the acquisition of agricultural land identified in a notice published in the Gazette in terms of s 16B (2) (a). An acquisition of the land referred to in s 16B (2) (a) would be a lawful acquisition. 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".

Learned Agent for the Respondent seized upon the following statement of

the Supreme Court at page 38 of its judgement to argue that an individual whose property has been acquired can proceed by judicial review:

"Section 16B (3) of the Constitution has not however taken away for the future the right of access to the remedy of judicial review in a case where the expropriation is, on the face of the record, not in terms of s 16B (2) (a). This is because the principle behind s 16B (3) and s 16B (2) (a) is that the acquisition must be on the authority of law. The question whether an expropriation is in terms of s 16B (2) (a) of the Constitution and therefore an acquisition within the

meaning of that law is a jurisdictional question to be determined by the exercise of judicial power. The duty of a court of law is to uphold the Constitution and the law of the land. If the purported acquisition is, on the face of the record, not in accordance with the terms of s 16B (2) (a) of the Constitution a court is under a duty to uphold the Constitution and declare it null and void. By no device can the Legislature withdraw from the determination by a court of justice the question whether the state of facts on the existence of which it provided that the acquisition of agricultural land must

depend existed in a particular case as required by the provisions of s 16B (2) (a) of the Constitution".

No doubt there is a remedy but only in respect of the payment of compensation under section 16B (2) (b) but judicial review does **not** lie at all in respect of land acquired under section 16B (2) (a) (i) and (ii), as correctly submitted by learned counsel for the Applicants. Indeed, the Applicants' land had been acquired under section 16B (2) (a) (i) and (ii). It is significant that, whereas under section 16B (2) (a) (iii), mention is made of the acquiring authority i.e. a Minister whose decision can admittedly be

subject to judicial review, no such mention is made in respect of section 16B (2) (a) (i) and (ii) so that in effect the Applicants cannot proceed by judicial review or otherwise. This is why specific reference is made to the fact that the provisions of section 18 (1) and (9) do not apply in relation to land acquired under section 16B (2) (a). The Applicants have been expressly denied the opportunity of going to court and seeking redress for the deprivation of their property, giving their version of events and making representations.

We are, therefore, satisfied that the Applicants have established that they have been deprived of their agricultural lands without having had the right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law, and we consequently hold that the Respondent has acted in breach of Article 4 (c) of the Treaty.

VI RACIAL DISCRIMINATION

The other issue raised by the Applicants is that of racial discrimination. They contended that the land reform programme is based on racial discrimination in that it targets white Zimbabwean farmers only. The

Applicants further argue that Amendment 17 was intended to facilitate or implement the land reform policy of the Government of Zimbabwe based on racial discrimination. This issue is captured in the Applicants' Heads of Arguments, paragraph 175, in the following terms:

> *"That the actions of the Government of Zimbabwe in expropriating land for resettlement purposes has been based solely or primarily on consideration of race and ethnic origin… It is being directed at white farmers… In reality it was aimed at persons who owned land because they were white. It mattered not whether they acquired the land during the colonial period or after independence".*

The Applicants further argued at paragraph 128 of the Heads of Argument that:

> *"The evidence presented to this Tribunal shows as a fact that the decision as to whether or not agricultural raw land in Zimbabwe is to be expropriated is determined by the race or country of origin of the registered owner. In terms of a policy designed to redress the ownership of land created during the colonial period, the GoZ has*

determined that no person of white colour or European origin was to retain ownership of a farm, and all such farms were to be expropriated. The fact that this could not be done through the normal procedures between 2000 and 2005 led to the enactment of Amendment 17, which was the ultimate legislative tool used by the GoZ to seize all the white owned farms".

The Applicants went on to argue that, even if Amendment 17 made no reference to the race and colour of the owners of the land acquired, that

does not mean that the legislative aim is not based on considerations of race or colour since only white owned farms were targeted by the Amendment. There is a clear legislative intent directed only at white farmers. According to the Applicants, the Amendment strikes at white farmers only and no other rational categorization is apparent therein. The Applicants further contended that the targeted farms were expropriated and given to certain beneficiaries whom they referred to as "chefs" or a class of politically connected beneficiaries. These were, in the words of the Applicants, *"senior political or judicial, or senior members of the armed services"*.

It is on the basis of those arguments that the Applicants, therefore, submitted in conclusion that the Respondent is in breach of Article 6 (2) of the Treaty, prohibiting discrimination, by enacting and implementing Amendment 17.

The Respondent, for its part, refuted the allegations by the Applicants that the land reform programme is targeted at white farmers only. It argued

instead that the programme is for the benefit of people who were disadvantaged under colonialism and it is within this context that the Applicants' farms were identified for acquisition by the Respondent. The farms acquired are suitable for agricultural purposes and happen to be largely owned by the white Zimbabweans. In implementing the land reform programme, therefore, it was inevitable that the people who were likely to be affected would be white farmers. Such expropriation of land under the Programme cannot be attributed to racism but circumstances brought about by colonial history. In any case, according to the Respondent, not only lands belonging to white Zimbabweans have been

targeted for expropriation but also those of the few black Zimbabweans who possessed large tracts of land. Moreover, some white farmers have been issued with offer letters and 99-year leases in respect of agricultural lands. The Respondent has, therefore, not discriminated against white Zimbabwean farmers and has not acted in breach of Article 6 (2) of the Treaty.

The Tribunal has to determine whether or not Amendment 17 discriminates against the Applicants and as such violates the obligation that the Respondent has undertaken under the Treaty to prohibit discrimination.

It should first be noted that discrimination of whatever nature is outlawed or prohibited in international law. There are several international instruments and treaties which prohibit discrimination based on race, the most important one being the United Nations Charter, which provides in Article 1 (3) that one of its purposes is:

> *"To achieve international corporation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to* ***race****, sex, language or religion".* (emphasis supplied).

There is also the Universal Declaration of Human Rights which provides in Article 2 as follows:

> *"Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as* ***race****, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".* (emphasis supplied).

Moreover, Article 2 (1) of the International Covenant on Civil and Political Rights and Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights prohibit racial discrimination, respectively, as follows:

> *"Each State party to the present Covenant undertakes to respect and ensure to all individuals within its territory without distinction of any kind such as* ***race****, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*.

> *"The States parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to* ***race****, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status"*. (emphasis supplied).

The above provisions are similar to Article 2 of the African Charter on Human and Peoples' Rights (African Charter) and Article 14 of the European Convention on Human Rights.

Discrimination on the basis of race is also outlawed by the Convention On the Elimination of All Forms of Racial Discrimination (the Convention). It is worth noting that the Respondent has acceded to both Covenants, the African Charter and the Convention and, by doing so, is under an obligation to respect, protect and promote the principle of non-discrimination and must, therefore, prohibit and outlaw any discrimination based on the ground of race in its laws, policies and practices.

Apart from all the international human rights instruments and treaties, the Treaty also prohibits discrimination. Article 6 (2) states as follows:

> *"SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views,* ***race****, ethnic origin, culture, ill health, disability or such other ground as may be determined by the Summit"* (emphasis supplied).

This Article, therefore, enjoins SADC and Member States, including the Respondent, not to discriminate against any person on the stated grounds, one of which is race.

The question then is, what is racial discrimination? It is to be noted that the Treaty does not define racial discrimination or offer any guidelines to that effect. Article 1 of the Convention is as follows:

> *"Any distinction, exclusion, restriction or preference based on* ***race****, colour, descent, or natural or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life"*. (the emphasis is supplied).

Moreover, the Human Rights Committee in its General Comment No. 18 on non-discrimination has, in paragraph 7, defined discrimination as used in the Covenant on Civil and Political Rights as implying *"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". (the underlining is supplied).

The Committee on Economic, Social and Cultural Rights, for its part, in its General Comment No. 16 on the equal right of men and women to the equality of all economic, social and cultural rights underlined at paragraph 13 that *"guarantees of non-discrimination and equality in international human rights treaties mandate both de facto and de jure equality. De jure (or formal) equality and de facto (or substantive) equality are different but interconnected concepts".*

The Committee further pointed out that formal equality assumes that equality is achieved if a law or policy treats everyone equal in a neutral manner. Substantive equality is concerned, in addition, with the effects of

laws, policies and practices in order to ensure that they do not discriminate against any individual or group of individuals.

The Committee went on to state at paragraphs 12 and 13 respectively that:

> *"Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or women, which cannot be justified objectively"*.
>
> *"Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory but has a discriminatory effect when implemented"*. (Emphasis supplied).

It is to be noted that what the Committee is stating about direct and indirect discrimination in the context of sex applies equally in the case of any other prohibited ground under the Covenant such as race.

The question that arises is whether Amendment 17 subjects the Applicants to any racial discrimination, as defined above. It is clear that the

Amendment affected all agricultural lands or farms occupied and owned by the Applicants and all the Applicants are white farmers. Can it then be said that, because all the farms affected by the Amendment belong to white farmers, the Amendment and the land reform programme are racially discriminatory?

We note here that there is no explicit mention of race, ethnicity or people of a particular origin in Amendment 17 as to make it racially discriminatory. If any such reference were made, that would make the provision expressly discriminatory against a particular race or ethnic group. The effect of such reference would be that the Respondent would be in breach of its obligations under the Article 6 (2) of the Treaty.

The question is whether, in the absence of the explicit mention of the word "race" in Amendment 17, that would be the end of the matter. It should be recalled that the Applicants argued that, even if Amendment could be held not to be racially discriminatory in itself, its effects make it discriminatory because the targeted agricultural lands are all owned by white farmers and that the purpose of Amendment 17 was to make it apply to white farmers

only, regardless of any other factors such as the proper use of their lands, their citizenship, their length of residence in Zimbabwe or any other factor other than the colour of their skin.

Since the effects of the implementation of Amendment 17 will be felt by the Zimbabwean white farmers only, we consider it, although Amendment 17 does not explicitly refer to white farmers, as we have indicated above, its implementation affects white farmers only and consequently constitutes indirect discrimination or *de facto* or substantive inequality.

In examining the effects of Amendment 17 on the applicants, it is clear to us that those effects have had an unjustifiable and disproportionate impact upon a group of individuals distinguished by race such as the Applicants. We consider that the differentiation of treatment meted out to the Applicants also constitutes discrimination as the criteria for such differentiation are not reasonable and objective but arbitrary and are based primarily on considerations of race. The aim of the Respondent in adopting and implementing a land reform programme might be legitimate if and when all lands under the programme were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups.

We, therefore, hold that, implementing Amendment 17, the Respondent has discriminated against the Applicants on the basis of race and thereby violated its obligation under Article 6 (2) of the Treaty.

We wish to observe here that if: (a) the criteria adopted by the Respondent in relation to the land reform programme had not been arbitrary but reasonable and objective; (b) fair compensation was paid in respect of the expropriated lands, and (c) the lands expropriated were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups, rendering the purpose of the programme legitimate, the differential treatment afforded to the Applicants would not constitute racial discrimination.

We can do no better than quote in this regard what the Supreme Court of Zimbabwe stated in **Commercial Farmers Union v Minister of Lands** 2001 (2) SA 925 (ZSC) at paragraph 9 where it dealt with the history of land injustice in Zimbabwe and the need for a land reform programme under the rule of law:

"We are not entirely convinced that the expropriation of white farmers, if it is done lawfully and fair compensation is paid, can be said to be discriminatory. But there can be no doubt that it is unfair discrimination…to award the spoils of expropriation primarily to ruling party adherents".

VII COMPENSATION

The Applicants have also raised the issue of compensation. Learned Counsel for the Applicants contended that expropriation of their lands by the Respondent was not accompanied by compensation and that failure to do so is a breach of the Respondent's obligations under international law and the Treaty. We note that the Respondent does not dispute the fact that

the Applicants are entitled to compensation. It, however, argued that the independence agreement reached in 1978 in London provided that payment of compensation for expropriated land for resettlement purposes would be paid by the former colonial power, Britain.

As regards the question of who should pay compensation, ordinarily in international law it is the expropriating state that should pay compensation. This would mean that, respecting the matter at hand, the Respondent should shoulder the responsibility of paying compensation to the Applicants for their expropriated lands. We note, however, that section 16B (2) (b) of the Amendment provides as follows:

> *"No compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it is acquired"*.

This provision excludes payment of compensation for land referred to in paragraph (a), (i) and (ii) which is agricultural land that has been acquired for resettlement purposes. It is difficult for us to understand the rationale

behind excluding compensation for such land, given the clear legal position in international law. It is the right of the Applicants under international law to be paid, and the correlative duty of the Respondent to pay, fair compensation.

Moreover, the Respondent cannot rely on its national law, its Constitution, to avoid an international law obligation to pay compensation as we have already indicated above.

Similarly, in the present case, the Respondent cannot rely on Amendment 17 to avoid payment of compensation to the Applicants for their expropriated farms. This is regardless of how the farms were acquired in the first place, provided that the Applicants have a clear legal title to them.

We hold, therefore, that fair compensation is due and payable to the Applicants by the Respondent in respect of their expropriated lands.

VIII CONCLUSIONS

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

(a) by unanimity, the Tribunal has jurisdiction to entertain the application;

(b) by unanimity, the Applicants have been denied access to the courts in Zimbabwe;

(c) by a majority of four to one, the Applicants have been discriminated against on the ground of race, and

(d) by unanimity, fair compensation is payable to the Applicants for their lands compulsorily acquired by the Respondent.

The Tribunal further holds and declares that:

(1) by unanimity, the Respondent is in breach of its obligations under Article 4 (c) and, by a majority of four to one, the Respondent is in breach of its obligations under Article 6 (2) of the Treaty;

(2) by unanimity, Amendment 17 is in breach of Article 4 (c) and, by a majority of four to one, Amendment 17 is in breach of Article 6 (2) of the Treaty;

(3) by unanimity, the Respondent is directed to take all necessary measures, through its agents, to protect the possession, occupation and ownership of the lands of the Applicants, except for Christopher

Mellish Jarret, Tengwe Estates (Pvt) Ltd. and France Farm (Pvt) Ltd. that have already been evicted from their lands, and to take all appropriate measures to ensure that no action is taken, pursuant to Amendment 17, directly or indirectly, whether by its agents or by others, to evict from, or interfere with, the peaceful residence on, and of those farms by, the Applicants, and

(4) by unanimity, the Respondent is directed to pay fair compensation, on or before 30 June 2009, to the three Applicants, namely, Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd. and France Farm (Pvt) Ltd.

By a majority of four to one, the Tribunal makes no order as to costs in the circumstances.

Delivered in open court this …….Day of……..., at Windhoek in the Republic of Namibia.

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H.E Justice Ariranga Govindasamy Pillay

PRESIDENT

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H.E Justice Isaac Jamu Mtambo, SC

MEMBER

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H.E Justice Dr Luis Antonio Mondlane

MEMBER

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H.E Justice Dr Rigoberto Kambovo

MEMBER

……

H.E Justice Dr Onkemetse B. Tshosa

MEMBER