

A Law Unto Themselves (Part II) : The Rulings and Dissolution of the SADC Tribunal

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AUG 03, 2012



Executive Summary

Part II recounts the Government of Zimbabwe's unrelenting seizure of white owned farms, the nationalisation of their land, and how, at the stroke of a pen and without compensation, white farmers were made trespassers on their own farms. It shows how the Government of Zimbabwe attacked the legitimacy of the SADC Tribunal¹, refused to obey the Tribunal's rulings based on international law, and cajoled the region's leaders into suspending the Tribunal. And how, finally, Zimbabwe's land laws – that are conspicuously at variance with international law and offend natural justice – found their way into the country's draft constitution. Zimbabweans need to stand united in defence of universally accepted human rights for all its citizens, and ensure that the principles of international law are enshrined in their constitution. I argue that justice must become the cornerstone of our peaceful transition to democracy and woven into the legal fabric of a future land policy. Therein lies a shared vision of Zimbabwe: democratic, inclusive, and at peace with itself.

The Third Chimurenga

By 2003, most white commercial farmers had been displaced and over 200,000 farm workers and their families – an estimated one million people – had lost their jobs and homes, as well as their access to farm schools and other social amenities.² While the government's own land audit showed that 2.8 million hectares of farmland lay idle,³ it continued its relentless prosecution of its *chimurenga* against white farmers. The Land Acquisition Amendment Act of 2004 allowed the government to compulsorily acquire their last and only farm. It allowed the state to acquire plantations, agriculturally based industries, export processing zones and wildlife conservancies. And it declared that the state could acquire as much land as it wanted. The Acquisition of Farm Equipment and Materials Act of 2004 allowed the government to compulsorily acquire displaced farmers' farm equipment and materials. And, to protect those who had earlier seized equipment unlawfully, the law was back-dated to December 2003.

Constitutional Amendment No. 17

In its final push to sweep the remaining white farming citizens from the land, the government nationalised most commercial farms by passing Constitutional Amendment No. 17 in 2005. It reiterated that no compensation would be paid for this land, only improvements. Section 3 of the Amendment specifically rescinded farmers' constitutional rights to the protection of the law (Section 18.1), and to a fair hearing in an independent and impartial court of law (Section 18.9).

In May 2006, Mike Campbell and other farmers mounted a challenge in the Supreme Court against Constitutional Amendment No. 17. They argued, first, that Parliament was not empowered to exclude the constitutional right of citizens to be heard in a court of law to settle disputes with the state. They also claimed that the amendment discriminated against them on the grounds of race. But before their case could be heard, the Amendment's enabling Act, the Gazetted Land (Consequential Provisions) Act, came into force in December 2006. Its passage meant that gazetted commercial farms had become state land, and that farmers had become trespassers on their own farms. Unless farmers had a government 'offer letter' or lease agreement, they had to vacate their farmland within 45 days and their homes within 90 days, or face eviction. Although 800 commercial farmers subsequently applied for government authority to remain on their farms, none was granted.⁴

In October 2007, 11 white commercial farmers appeared before the Chegutu magistrate's court accused of having failed to leave their gazetted farms. One of them was Mike Campbell. The Supreme Court had heard his constitutional challenge to Amendment 17, but had reserved judgement for 6 months. As the Supreme Court had not responded to inquiries about the case, it was assumed that it had declined to exercise its jurisdiction. Thus, when the Chegutu magistrate rejected the farmers' appeal against eviction, Campbell sought relief from the SADC Tribunal in Windhoek, Namibia. Campbell, in his application to the Tribunal, contended that the land acquisition process was unlawful under international customary law, the SADC Treaty, and the African Charter on Human and People's Rights. As such, he sought an order from the Tribunal declaring, first, that Constitutional Amendment No. 17 violated his fundamental rights protected under Article 6 of the SADC Treaty and, second, requesting an interdict to stop the Zimbabwean government from acquiring his farm. In reserving judgement in December 2007, the Tribunal granted interim relief to Campbell. It ordered the Zimbabwe government not to evict Campbell or interfere with his farming operations until the Tribunal had reached its final verdict.

Suddenly, the Tribunal's ruling galvanised the Supreme Court into action. In a belated attempt to pre-empt and nullify the Tribunal's order, the Supreme Court dismissed Campbell's application in January 2008.⁵ Unsurprisingly, but contrary to the accepted norms of natural justice and international law, it ruled that Parliament had the right to oust the jurisdiction of the courts to prevent judicial arbitration between citizens and the state. The Court also refused to countenance the charge that Amendment 17 discriminated against the applicants on the basis of race or colour. Then, in June 2008, Mike Campbell, his wife, and his son-in-law, Ben Freeth, were abducted and grievously beaten in a bid to terrify them into dropping their case with the Tribunal; but to no avail. Although the assailants were known, the police chose not to investigate the crime, and no charges were laid against them.

The SADC Tribunal Rulings

Having confirmed that it had jurisdiction to consider Campbell's application,⁶ the Tribunal considered, first, whether Campbell and others had been denied access to the courts. It held that "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."

Thus any clause that allows an executive decision to prohibit the court from examining this right offends against natural justice and is therefore null and void. Having found that Campbell and others had been deprived of their agricultural lands without these rights, the Tribunal ruled that the Zimbabwe government and Constitutional Amendment No. 17 were in violation of Article 4(c) of the SADC Treaty, which requires member states to respect the principles of “human rights, democracy and the rule of law”.

Second, the Tribunal considered whether the applicants had been discriminated against on the basis of race. Campbell and others had argued that Constitutional Amendment No. 17 targeted land owned by white farmers based on the colour of their skin – regardless of any other factors, such as the proper use of their lands or their citizenship. The Tribunal agreed. The Tribunal found that such discrimination was neither reasonable nor objective and based primarily on considerations of race. It found that the Zimbabwe government and Constitutional Amendment No.17 violated Zimbabwe’s obligation under Article 6(2) of the SADC Treaty that declares that member states “shall not discriminate against any person on grounds of gender, religion, political views, race,” etc.

Third, the Tribunal considered whether or not compensation was payable for the lands compulsorily acquired. In its submission, the government had claimed that the “independence agreement in 1978 [sic] in London provided that payment of compensation for expropriated land for resettlement purposes would be paid by the former colonial power, Britain.” However, the Tribunal was unequivocal in its judgment:

“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 [Campbell, *et al.*] under international law to be paid, and the correlative duty of the Respondent [Zimbabwe Government] to pay, fair compensation. Moreover, the Respondent cannot rely on its national law, its Constitution, to avoid an international law obligation to pay compensation. 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.”⁷

The implications were clear. There was no basis in international law that requires Britain to assume responsibility to compensate displaced white farmers for their land: Constitutional Amendment No. 16 passed in 2000 is null and void. Note specifically, however, that the *Zimbabwe Government cannot rely on its national law, its Constitution, to avoid an international obligation to pay compensation*. This principle is contained in Article 27 of the Vienna Convention on the Law of Treaties, which states that:

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

Instead of meeting its obligations under international law, the Zimbabwe government set about discrediting and emasculating the Tribunal. President Mugabe contemptuously dismissed the Tribunal and the rule of international law: “Some farmers went to the SADC... but that’s nonsense, absolute nonsense, no-one will follow that. Our land issues are not subject to the SADC Tribunal.” He then added that, “The few remaining white farmers should quickly vacate their farms as they have no place there.”⁸

The Demise of the Tribunal

In defiance of the Tribunal's ruling, Campbell's farm was invaded. When the invaders ignored a High Court ruling in May 2009 ordering them to leave, Campbell again appealed to the Tribunal. Without hesitation, the Tribunal found Zimbabwe in contempt of its decision and in June referred the matter to the SADC Summit to take appropriate action. But when SADC leaders met in September 2009, the matter was not acted upon, let alone considered. By then Freeth's homestead had been burnt down and Campbell's farm had fallen into the hands of invaders.

Before the Summit, in August 2009, the government had issued a specious legal opinion challenging the legality of the Tribunal, and its jurisdiction, mandate and powers to enforce decisions. Its aim, to discredit the Tribunal to avoid compliance with international law, slowly gained acceptance amongst SADC leaders.

Undeterred, Zimbabwe's commercial farmers sought a High Court order to register the Tribunal's decision in Zimbabwe in November 2009.⁹ Contrary to the government's attempts to repudiate the Tribunal's jurisdiction, the High Court found that the Protocol of the Tribunal undeniably constituted an integral part of the SADC Treaty and, hence, the Tribunal's decisions were binding on Zimbabwe. Yet, the High Court refused to confirm and register the decision. To obfuscate Zimbabwe's indisputable treaty obligations to enforce the Tribunal's ruling, the Court instead – based on South African legal opinion on foreign judgments¹⁰ – determined whether the recognition and enforcement of the Tribunal's decision would be contrary to 'public policy'. It then used the same legal reasoning as the Supreme Court to dismiss Campbell's application. It argued that the Judiciary had a duty to uphold Parliament's enactments, even if they infringed fundamental human rights and contradicted natural justice and international law. In effect, the Court invoked provisions of Zimbabwe's Constitution and policies as a justification for its failure to carry out its international agreement, thus contravening the Vienna Convention on the Law of Treaties.

Just as hopes were raised in February 2010, when South Africa's High Court in Pretoria recognised the Tribunal's ruling as enforceable, faith in the international justice system quickly faded. At the SADC Summit in August 2010, the region's leaders decided to bar the Tribunal from considering any new cases for 6 months while the Tribunal's role and functions were being reviewed. But when the erudite legal recommendations for a more robust Tribunal were presented to SADC leaders in May 2011,¹¹ they were pushed aside. Instead the Summit suspended the Tribunal until a revised SADC Protocol on the Tribunal has been approved at a Summit scheduled for August 2012. The Summit's presumed intent was to prevent SADC citizens from seeking international redress for injustices suffered at the hands of their own governments.¹²

Sadly, Mike Campbell died in April 2011. But his fight for justice continues. In March 2012, the African Commission on Human and People's Rights made a preliminary ruling to formally register an application brought by Ben Freeth and another dispossessed Zimbabwean farmer, Luke Tembani, to be heard by the African Court on Human and People's Rights.¹³ They are seeking an order from the Court that will require the SADC Summit – consisting of all 14 Heads of State, including President Robert Mugabe – to reinstate the Tribunal so that it continues to function and protect the human rights of SADC citizens in accordance with Article 16 of the SADC Treaty.

The Draft Constitution

The Inclusive Government has specifically constructed clauses in its draft constitution (Chapter 16 on Agricultural Land) to counter the rulings of the SADC Tribunal. If the Zimbabwean people accept the draft constitution in a referendum they will have condoned laws that deny Zimbabwean citizens natural justice and international law – as enshrined in the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights.

Every child is taught that “two wrongs do not make a right”. Zimbabwe must correct the historical wrongs regarding land distribution, but in a manner that is just and inclusive. Only then can we truly bring closure to the land question and begin a process of healing and reconciliation, not just between Zimbabweans, but with the world at large.

This paper is part of the Zimbabwe Land Series

¹ Protocol of the Tribunal established in terms of Section 16 of the Southern African Development Community (SADC) Treaty was signed on 7 August 2000 by the Summit, which comprises the heads of all 14 member states, including Zimbabwe.

² Sachikonye, L. (2003) *The Situation of Commercial Farm-workers after Land Reform*. Report: Harare.

³ Zimbabwe (2003) *Presidential Land Review Committee*, Table 3, p.42

⁴ *Zimbabwe Independent*, 29 October 2009: Reporting on CFU statement.

⁵ *Mike Campbell (Pvt) Ltd & Another v Minister of National Security Responsible for Land, Land Reform and Resettlement & Another* SC 49/07

⁶ *Campbell and Others vs Republic of Zimbabwe* SADC (T) Case No. 2/2007. Campbell had been joined by 77 other commercial farmers in the application to the SADC Tribunal.

⁷ *Ibid.* (p.56).

⁸ SW Radio Africa, 2 March 2009.

⁹ *Gramara (Pvt.) Ltd and Other vs Government of the Republic of Zimbabwe and Others*. HC33/09. 26 January 2010.

¹⁰ Joubert (ed.) (1993) *The Law of South Africa*. Vol. 2.

¹¹ Report prepared by Lorand Bartels of Cambridge University and advisor to the World Trade Institute.

¹² Derek Matyszak, (2011) *The Dissolution of the SADC Tribunal*. Research and Advocacy Unit. (August)

¹³ The **Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights** was signed by Zimbabwe in June 1998.