

Recent Developments

Tyranny on Trial: Regional Courts Crack Down on Mugabe's Land "Reform." By Daniel Hemel & Andrew Schalkwyk

INTRODUCTION

One night in June 2008, militants associated with Zimbabwe's ruling ZANU-PF Party stormed a citrus farm owned by seventy-four-year-old Mike Campbell, breaking four of his ribs and his collarbone¹ while inflicting such severe brain damage that Campbell now has difficulty in adding simple sums.² In April 2009, the militants returned to seize the farm; in August, they burned down the house where Campbell and his family had lived for nearly four decades.³

A much less violent—but equally dramatic—event occurred on March 30, 2010, when attorneys representing Campbell and seventy-seven other white Zimbabwean farmers attached a luxury home in Cape Town, South Africa owned by the Reserve Bank of Zimbabwe.⁴ The attachment is a far cry from full compensation for Campbell and his co-plaintiffs—and only covers the plaintiffs' legal costs of 113,000 rand (approximately US\$15,500)⁵—but it marks a rare instance of an oppressive regime being held to account for its human rights abuses. Moreover, it shows that the Southern African Development Community (SADC) Tribunal, a court that opened for argument only three years ago, may be a much more powerful force for human rights in the region than the tribunal's founders ever foresaw.

When Southern African leaders gathered in Windhoek, Namibia in August 1992 to sign the SADC Treaty, attendees hailed the "historic occasion" and announced the dawn of a new era of regional integration.⁶ But Article 16 of the Treaty,⁷ establishing a regional court, was an afterthought at the time; the tribunal did not come into being for nearly another decade and a half. In the meantime, SADC made modest steps toward trade liberalization but accomplished very little on the political front. Regional leaders have been unwilling to intervene in member-state affairs, and many observers have dismissed the organization as a "talking shop."⁸ SADC's weaknesses are on

1. Robyn Dixon, *They Beat Him, but Not into Submission*, L.A. TIMES, Aug. 7, 2008, available at <http://articles.latimes.com/2008/aug/07/world/fg-farmer7>.

2. Robyn Dixon, *Tough Zimbabwe Farm Family Survives Another Blow*, L.A. TIMES, Sept. 7, 2009, available at <http://articles.latimes.com/2009/sep/07/world/fg-zimbabwe-farmer7>.

3. *Id.*

4. See Tony Hawkins, *Zimbabwe Farmers Seize State Property*, FIN. TIMES, Mar. 31, 2010, <http://www.ft.com/cms/s/0/4abf49dc-3cda-11df-bbcf-00144feabdc0.html>; Stephan Hofstatter, *Zimbabwe Properties Attached To Pay Farmers*, BUS. DAY (S. Afr.), Mar. 30, 2010, <http://www.businessday.co.za/articles/Content.aspx?id=104924>.

5. See Hofstatter, *supra* note 4.

6. See, e.g., Accadoga Chiledi, *Africa: Southern African Development Community Is Born*, INTER PRESS SERV., Aug. 17, 1992.

7. Treaty of the Southern African Development Community art. 16, Aug. 17, 1992, 32 I.L.M. 116, 126.

8. See, e.g., Cris Chinaka, *Doubts over Mugabe's Summit Attendance*, MAIL & GUARDIAN (S. Afr.), Apr. 11, 2008, available at <http://www.mg.co.za/article/2008-04-11-doubts-over-mugabes-summit-attendance>; Editorial, *The Mere Talk Shop That Is AU and SADC*, MMEGI ONLINE (Bots.), Feb. 8, 2008,

dramatic display in Zimbabwe: after years of inaction, the SADC Summit—the closed-door body of regional heads of state—finally brokered an accord between President Robert Mugabe and his political rivals in 2008, but it stood on the sidelines as Mugabe brazenly breached the agreement’s terms.⁹

In contrast to the political paralysis of the SADC Summit, the new tribunal is active in the region. Over the past three years, it has issued a series of rulings condemning Zimbabwe’s land reform program and potentially affording monetary compensation to Mugabe’s victims. As with the SADC Summit, the tribunal must rely on member states to enforce its rulings. But this obstacle has not been insurmountable: the Zimbabwean Supreme Court has recognized—at least in principle—the binding effect of tribunal decisions, and South African courts are allowing private parties to enforce SADC judgments against other member states inside South Africa’s borders. The experience of the tribunal so far shows that domestic and supranational judges may be able to establish a regional human rights regime even when heads of state lack the will to act and regional political institutions are crippled by inertia.

I. MIKE CAMPBELL (PVT) LTD. V. REPUBLIC OF ZIMBABWE

Although land reform in Zimbabwe began three decades ago when the country transitioned from a white-dominated government to majority rule, the process became much more rapid—and more ruthless—in 2000, when pro-Mugabe mobs moved onto thousands of white-owned farms across the country.¹⁰ Three years later, Zimbabwe’s parliament passed Amendment 17 to the constitution, allowing presidential appointees to expropriate farms without compensation or judicial review.¹¹ Amid these violent land grabs, production on Zimbabwe’s white-owned farms—which had accounted for three-quarters of the state’s agricultural output—ground to a halt. The violence has displaced more than 4000 of Zimbabwe’s 4500 white farm owners¹² and approximately one million black farm workers.¹³

Having been notified that the government intended to acquire his land, Mike Campbell brought a challenge to the validity of Amendment 17 in the Zimbabwe Supreme Court in 2006. Campbell’s counsel argued that Amendment 17 was invalid because it contravened the “core values” and “essential features” of the Zimbabwean Constitution.¹⁴ However, in March

<http://www.mmegi.bw/index.php?sid=9&aid=43&dir=2008/February/Friday8>.

9. See, e.g., Violet Gonda, *Zimbabwe: Jimmy Carter Says SADC Ineffective in Dealing with Country*, SW RADIO AFR. (London), Nov. 24, 2008, <http://allafrica.com/stories/200811241516.html>.

10. Simon Robinson, *Power to the Mob*, TIME EUR., May 1, 2000, available at <http://205.188.238.181/time/europe/magazine/2000/0501/cover.html>.

11. CONST. OF ZIMB. § 16B, amended by Constitution of Zimbabwe Amendment (No. 17) Act, 2005, available at <http://www.parl.zim.gov.zw/cms/UsefulResources/ZimbabweConstitution.pdf>.

12. *Zim White Farmers’ Struggle*, NEWS24.COM (S. Afr.), Feb. 23, 2010, http://www.news24.com/Content/Africa/Zimbabwe/966/385966c8893e495fbd34652d93ed98ae/23-02-2010-10-06/Zim_white_farmers_struggle.

13. Ann Hellman, *Zimbabwe: One Million Casualties of Land Reform*, INTER PRESS SERV., Jan. 25, 2010.

14. Mike Campbell (Pvt) Ltd. v. Minister of Nat’l Sec. Responsible for Land, Land Reform & Resettlement, [2008] ZWSC 1, at 2, <http://www.saflii.org/zw/cases/ZWSC/2008/1.pdf>.

2007, the Zimbabwe Supreme Court reserved judgment in Campbell's case,¹⁵ and in October of that year, Campbell turned to the SADC Tribunal for an injunction to protect Campbell's rights while his case was resolved before Zimbabwe's courts.

Campbell's was the first case heard by the tribunal.¹⁶ According to the Protocol to the SADC Treaty, the court has "jurisdiction over all disputes . . . which relate to . . . the interpretation and application of the [SADC] Treaty,"¹⁷ but the scope of this provision had yet to be tested. Article 4 of the SADC Treaty provides that "SADC and Member States shall act in accordance with the . . . principles . . . [of] human rights, democracy, and the rule of law,"¹⁸ and Article 6 provides that "SADC and Member States shall not discriminate against any person on [the] grounds of gender, political views, race, ethnic origin, culture, or disability."¹⁹ Campbell argued that Zimbabwe's land reform program ran afoul of both provisions; thus, his dispute with the Zimbabwean government "relate[d] to . . . the application of the . . . Treaty."

In December 2007, the tribunal issued an interim ruling in which it deferred judgment on Campbell's substantive claims but confirmed that the tribunal had jurisdiction: "This is a matter that requires interpretation and application of the [SADC] Treaty," the tribunal stated.²⁰ Although the three-judge panel acknowledged that the Protocol requires plaintiffs to exhaust domestic remedies before bringing suit in the regional court, it issued an interim order enjoining Zimbabwe from evicting Campbell or "interfer[ing] with [his] peaceful residence" on his farm.²¹ Ultimately, the tribunal allowed seventy-seven other white farmers to join Campbell's SADC suit.²²

Meanwhile, in January 2008, the Zimbabwe Supreme Court threw out Campbell's challenge to the constitutionality of Amendment 17. The Court roundly rejected Campbell's argument that the Zimbabwean Constitution contained essential features that could not be overridden by amendment.²³ Having exhausted his domestic remedies, Campbell was now clear to proceed with his suit in the tribunal.

The SADC Tribunal, in its November 2008 4-1 judgment, concluded that the Zimbabwean government had breached its obligations under Article 4 of the SADC Treaty by denying Campbell and the seventy-seven other farmers the "right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law."²⁴ It also concluded that "although

15. *Court Reserves Judgment in Farmers' Case*, HERALD (Zimb.), Mar. 24, 2007, <http://allafrica.com/stories/200703260013.html>.

16. *Landmark Farm Case at SADC Tribunal*, NAMIBIAN, Dec. 11, 2007, [http://www.namibian.com.na/index.php?id=28&tx_ttnews\[tt_news\]=32965&no_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=32965&no_cache=1).

17. Protocol on Tribunal and Rules and Procedures Thereof, art. 15, para. 2, Aug. 7, 2000, <http://www.sadc.int/tribunal/protocol.php>.

18. See Treaty of the Southern African Development Community, *supra* note 7, art. IV.

19. *Id.* art. VI, para. 2.

20. *Mike Campbell (Pvt) Ltd. v. Republic of Zimb.*, [2007] SADCT 1, at 3, <http://www.saflii.org/sa/cases/SADCT/2007/1.rtf>.

21. *Id.*

22. The order is unpublished. For the judgment, see *Mike Campbell (Pvt) Ltd. v. Republic of Zimb.*, [2008] SADCT 2, <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>.

23. *Mike Campbell (Pvt) Ltd. v. Minister of Nat'l Sec. Responsible for Land, Land Reform & Resettlement*, [2008] ZWSC 1, <http://www.saflii.org/zw/cases/ZWSC/2008/1.pdf>.

24. *Mike Campbell (Pvt) Ltd.*, [2008] SADCT 2, at 26.

Amendment 17 does not explicitly refer to white farmers . . . its implementation affects white farmers only and consequently constitutes indirect discrimination or de facto or substantive inequality.”²⁵ The tribunal ordered Zimbabwe to compensate three of the farmers who had already been evicted and “to ensure that no action [be] taken” to oust Campbell and the seventy-four others from their lands.²⁶

II. EFFORTS TO ENFORCE THE JUDGMENT

The Zimbabwean government scoffed at the SADC Tribunal’s order. Mugabe described the decision as “absolute nonsense.”²⁷ In April 2009, pro-Mugabe militants forcibly evicted Campbell.²⁸ The following month, Campbell filed an urgent application to the SADC Tribunal seeking to have the Zimbabwean government held in contempt of court. In June, the tribunal concluded that Zimbabwe had breached the November 2008 ruling, and it referred the matter to the SADC Summit “to take appropriate action.”²⁹ At the same time, it ordered the Zimbabwean government to pay Campbell’s legal costs.³⁰ But at the September SADC Summit, instead of condemning Mugabe, the heads of the SADC member states called for an end to international sanctions against Zimbabwe.³¹

Meanwhile, two of the parties to Campbell’s SADC suit sought to register the tribunal’s decision in Zimbabwean court. Although government lawyers argued that SADC rulings were not binding in Zimbabwe because Mugabe had repudiated the tribunal’s jurisdiction, Zimbabwean High Court Judge Bharat Patel dismissed the government’s arguments as “essentially erroneous and misconceived.” To the contrary, Patel found that “the decisions of the tribunal are binding and enforceable within the territories of Member States.” However, Patel, following South African common law, stated that a foreign judgment is not enforceable in domestic court if it is “in conflict with public policy.” In light of the land reform policy pursued by the Mugabe government, Patel concluded that the SADC judgment could not be enforced by Zimbabwean courts.³²

Rebuffed by the Zimbabwean High Court, Campbell and two other farm owners turned to the High Court of South Africa. While acknowledging the procedure’s “novelty,” Campbell’s lawyers were confident that “the common

25. *Id.* at 53.

26. *Id.* at 59.

27. Cris Chinaka, *Mugabe Says Zimbabwe Land Seizures Will Continue*, MAIL & GUARDIAN (S. Afr.), Feb. 28, 2009, available at <http://www.mg.co.za/article/2009-02-28-mugabe-says-zimbabwe-land-seizures-will-continue>.

28. See Jan Raath, *Anti-Mugabe Farmer Mike Campbell Who Stood Up to Thugs Loses His Land*, TIMES (London), Apr. 8, 2009, available at <http://www.timesonline.co.uk/tol/news/world/africa/article6055794.ece>.

29. Campbell v. Republic of Zimb., [2009] SADCT 1, at 3, <http://www.saflii.org/sa/cases/SADCT/2009/1.pdf>.

30. *Id.*

31. Scott Baldauf, *African Leaders Embrace Mugabe at SADC Summit*, CHRISTIAN SCI. MONITOR, Sept. 11, 2009, available at <http://www.csmonitor.com/World/Africa/2009/0911/p06s10-woaf.html>.

32. Gramara (Pvt) Ltd. v. Republic of Zimb., [2010] ZWHHC 1, <http://www.saflii.org/zw/cases/ZWHHC/2010/1.pdf>.

law on recognition and enforcement was clear enough to indicate that prospects were good,” and they believed that registering the judgment in South Africa would “vindicate the rule of law in the region and end impunity.”³³ Campbell’s attorneys argued that the application met all of the common law criteria for registration and noted that the Zimbabwean High Court had recognized the validity of the SADC Tribunal. Although the public policy argument against enforcement of the judgment had prevailed before the Zimbabwean High Court, they noted that “the South African domestic public policy is clearly in favour of registering the rulings,” since South Africa “abhors racial discrimination [and] arbitrary expropriation.”³⁴ As a test run, and because quantification of the full compensation for the expropriated farms was yet to be decided by the regional court,³⁵ the suit was limited to recovery of the legal fees already awarded by the tribunal.³⁶

The farmers’ application went unopposed by the Zimbabwean government. In a single paragraph decision delivered on February 25, the High Court of South Africa registered the decisions of the SADC Tribunal and calculated the farmers’ costs to be 112,780.13 rand (approximately US\$15,500).³⁷ The attachment of the Cape Town property was a first step toward enforcing this ruling.³⁸

CONCLUSION

On the one hand, the *Campbell* case and the parallel litigation in South African courts highlight the limits of human rights law. Nearly a year has passed since the tribunal in Windhoek instructed the SADC Summit to “take appropriate action” in the *Campbell* case. Courts seemingly cannot compel heads of state to act when political will is absent.

On the other hand, the tribunal’s burgeoning docket demonstrates that Southern Africans of all races see the regional court as a counterweight to human rights abuses by government officials. In 2008, Luke Muyandu Tembani, a black commercial farmer in Zimbabwe whose lands were seized by a state bank because he defaulted on a mortgage, sued the Mugabe

33. E-mail from Frank Pelsler, Attorney, to Andrew Schalkwyk (Mar. 15, 2010, 3:43:15 EST) (on file with authors).

34. Applicants’ Heads of Argument ¶ 32, *Fick v. Gov’t of the Republic of Zimb.*, Case No. 77881/2009 (High Ct. S. Afr. Feb. 25, 2010).

35. E-mail from Frank Pelsler, *supra* note 33.

36. Applicants’ Heads of Argument, *supra* note 34, ¶ 55.

37. *Fick v. Gov’t of the Republic of Zimb.*, Case No. 77881/2009 (High Ct. S. Afr. Feb. 25, 2010), <http://www.saflii.org/userfiles/file/CourtOrders/South%20African%20Court%20ruling%20on%20SADC.pdf>.

38. Two related cases suggest that Mugabe’s victims may find South African courts amenable to their claims. First, in July 2008, the High Court of South Africa ordered the South African government to “take all necessary steps” to protect the rights of a white South African citizen who had lost land in Zimbabwe to Mugabe. In the same case, the court ruled in February 2010 that the South African government was financially liable for its inaction. *Von Abo v. Gov’t of the Republic of S. Afr.*, [2010] ZAGPPHC 4, at 4, <http://www.saflii.org/za/cases/ZAGPPHC/2010/4.pdf>. Second, in November 2009, the same court recognized a settlement agreement between the South African government and one of Campbell’s co-plaintiffs stating that a bilateral investment treaty between Pretoria and Harare did not affect the plaintiff’s rights to enforce SADC Tribunal judgments in South Africa. Stephan Hofstatter, *Benchmark Ruling Paves Way for Zimbabwe Treaty*, BUS. DAY (S. Afr.), Nov. 27, 2009, available at <http://allafrica.com/stories/200911270329.html>.

government in the SADC Tribunal. The following year, the regional court ruled that the state bank “had acted against the principles of natural justice” because it did not allow Tembani to contest the amount of the alleged debt before “an independent and impartial” judge.³⁹ Meanwhile, a small Zimbabwean political faction that was excluded from the (ill-fated) 2008 power-sharing agreement between Mugabe and the main opposition party petitioned the SADC Tribunal to set aside the 2008 accord.⁴⁰ And in early 2010, a union representing Zimbabwe’s black farm workers—who have suffered the most severe losses as a result of land reform⁴¹—announced that it too would sue the Mugabe government before the Windhoek court.⁴²

As a symbolic matter, the court’s condemnations of the Mugabe government may carry greater weight than those of Western governments and NGOs who deliver the same message. Whereas the Mugabe regime has deployed anti-imperialist rhetoric effectively against the latter category of critics,⁴³ Mugabe’s pan-Africanist propaganda will sound even more strained when directed against an African court, especially one whose legitimacy has been affirmed by the Zimbabwean judiciary. Moreover, the possibility that South African courts will enforce tribunal orders by attaching Zimbabwean assets means that Mugabe’s victims may be able to obtain some monetary compensation—albeit not full redress—for their suffering.

If litigants succeed in attaching more of Zimbabwe’s nondiplomatic assets in South Africa, the impact on the Mugabe regime may be much more powerful than the sanctions imposed by the United States and the European Union. As of 2009, South Africa accounted for approximately 42% of Zimbabwe’s exports and 62% of its imports (compared to 22% and 9% respectively from the European Union).⁴⁴ Thus if litigants succeeded in attaching Zimbabwean assets across the SADC region, well over half of Zimbabwe’s international trade could be affected. Although Campbell and his co-plaintiffs so far only have targeted Zimbabwe-owned real estate, the South African human rights group AfriForum maintains that the farmers could potentially attach other assets such as Air Zimbabwe jets.⁴⁵ In short, the

39. Tembani v. Republic of Zimb., [2009] SADCT 3, <http://www.saflii.org/sa/cases/SADCT/2009/3.pdf>; see also Brigitte Weidlich, *SADC Tribunal Rules Farm Repo by Agri Bank of Zimbabwe Illegal*, NAMIBIAN, Aug. 17, 2009, <http://allafrica.com/stories/200908240045.html>. Zimbabwe has refused to comply with the tribunal’s order. *Evicted Farmer’s Property Sold*, LEGAL MONITOR (Zimb.), Nov. 2, 2009, at 4, available at <http://www.sokwanele.com/system/files/LM-19.pdf>.

40. The regional court concluded that since the faction, the United People’s Party, did not have any elected representatives in the National Assembly or Senate, its exclusion could be supported on the basis of “objective criteria,” and its application was denied. *United Peoples’ Party of Zimb. v. SADC*, [2009] SADCT 4, <http://www.saflii.org/sa/cases/SADCT/2009/4.pdf>.

41. See, e.g., GEN. AGRIC. & PLANTATION WORKERS UNION OF ZIMB., *IF SOMETHING IS WRONG . . . : THE INVISIBLE SUFFERING OF COMMERCIAL FARM WORKERS AND THEIR FAMILIES DUE TO “LAND REFORM”* (2009), available at <http://changezimbabwe.com/images/PortableDF/somethingiswrong111109.pdf>.

42. Clara Smith, *Union Wants SADC Court Protection*, ZIMONLINE, Feb. 4, 2010, <http://www.zimonline.co.za/Article.aspx?ArticleId=5670>.

43. See, e.g., Ian Phimister & Brian Raftopoulos, *Mugabe, Mbeki & the Politics of Anti-Imperialism*, 101 REV. AFRICAN POL. ECON. 385 (2004).

44. See World Trade Org., Trade Profile: Zimbabwe (Mar. 2010), <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Country=ZW>.

45. *SA Court Ruling Deals Blow to Mugabe Land Seizures*, ZIMONLINE, Feb. 26, 2010, <http://www.zimonline.co.za/Article.aspx?ArticleId=5770>.

SADC Tribunal—working in tandem with national courts—may be able to impose economic sanctions on the Mugabe regime for its human rights abuses. As the economic center of the region and home to an independent judiciary, South Africa might prove to be the ideal forum for the enforcement of international and regional human rights norms.

If the SADC Tribunal continues to issue anti-Mugabe rulings, and if domestic courts choose to enforce those rulings by attaching nondiplomatic assets, the political paralysis of the SADC Summit may become a blessing in disguise for Mugabe foes. In theory, the SADC leaders could curtail the tribunal by amending the court's Protocol and limiting its jurisdiction. Alternatively, they could screen future nominees to the court with the goal of altering its ideological composition over the long term. However, amending the Protocol would require a degree of coordination among SADC heads of state that the Summit has not demonstrated in recent years. Moreover, several SADC states have taken a hard line against the Mugabe regime.⁴⁶ Each member state can block any action by the consensus-dependent Summit. Finally, since each can nominate one of its own nationals to the court, it is unlikely that pro-Mugabe jurists will capture all of the tribunal's seats. The inertia that has overcome the SADC Summit so far means that the tribunal cannot rely on the regional organization's political branch to enforce its rulings. But the same inertia may mean that the court will have free rein for the foreseeable future.

46. See, e.g., Stephen S. Kingah & Stefan Smis, *The Southern African Development Community (SADC)*, REP. ON INT'L ORGS., Winter 2010, <http://asil.org/rio/sadc.html> (noting that leaders of Botswana and Zambia have been "very critical" of Mugabe); David McKenzie, *Zimbabwe: Mugabe a Fallen African Hero*, CNN.COM, June 26, 2008, <http://edition.cnn.com/2008/WORLD/africa/06/26/zimbabwe.explainer> (noting that Mugabe "has received strident criticism from Botswana, Tanzania and . . . Angola").

