

# 02/07\_JUD\_DO2 Mike Campbell (Pvt) Ltd. & 78 Others v. Zimbabwe (Dissenting Opinion - Onkemetse B. Tshosa)

## Dissenting opinion - Dr Onkemetse B. Tshosa

During the deliberations I agreed with my colleagues on the main conclusions reached on this case. I agreed because it was very clear to me that Amendment 17 denied the applicants a remedy under the national law of Zimbabwe, that they have been denied access to the courts by the ouster clause in the Amendment concerning compulsory acquisition of the agricultural lands and that the said Amendment excludes compensation for the compulsory acquisition of agricultural land. However, I did not agree with the conclusion reached on the issue of racial discrimination, which is to the effect that although Amendment 17 was not explicitly discriminatory, it is indirectly discriminatory against the applicants on the basis of race. The main basis of the majority view on this issue is that because the implementation of Amendment 17 affects the applicants and who own agricultural lands that are being acquired by the respondent for resettlement purposes that makes the Amendment racially discriminatory. This is the conclusion that makes me break ranks with my brethren.

I should observe that during the deliberations on the case, it was not entirely clear to us how the issue of racial discrimination would be resolved. It was only towards the end of the deliberations, that is, a day before the judgment was to be delivered, that the majority were inclined to hold that Amendment 17 indirectly discriminated against the applicants. This should also explain why my view is so brief.

It is not in dispute that the agricultural lands that were compulsorily acquired by the respondent, and are the subject of these proceedings belong to, or are owned by, the applicants. This means that the implementation of 17 Amendment applies mainly to agricultural lands owned by the applicants or rather the effects of the implementation of the Amendment will be felt mainly by the applicants. Thus on the face of it, one is inclined to conclude that although Amendment 17 does not explicitly relate to white farmers, its implementation only affects the applicants and is therefore indirectly discriminatory on the basis of race, and thereby in violation of the respondent's legal obligation under section 6(2) of the SADC Treaty outlawing discrimination, *inter alia*, on the basis of race.

In my view, there is no basis for this conclusion and these are my reasons. Firstly, the fact that the agricultural lands of the applicants have been, and being affected, by the implementation by Amendment 17 is not because they are of white origin. The Amendment 17 affects their land because the agricultural land that is required for resettlement purposes, and which is the subject of the Amendment is in their hands. In other words, Amendment 17 targets agricultural land and they are affected not because they are of white origin but because they are the ones who own the land in question. Thus, the target of Amendment 17 is agricultural land and not people of a particular racial group. This means that in implementing the Amendment it was always going to affect those in possession of the land be they of white, black or other racial background. In my view, this does not amount to racial discrimination whether directly or indirectly.

There is also the second reason for holding the view that the implementation of Amendment 17 is not indirectly discriminatory against the applicants. In oral arguments, and this is on record, the respondents were specifically asked by the Tribunal whether there were other people apart from the applicants whose agricultural land was compulsorily acquired on the basis of Amendment 17. The answer was in the affirmative and this was not challenged by the applicants. In my view, this means that the applicants or rather white Zimbabwean farmers were not the only ones who were affected by the Amendment as to make it racially discriminated even indirectly. The Amendment is of a general application. It applies to all Zimbabweans who are in occupation of the land that is required for resettlement purposes irrespective of their racial origins.

Admittedly, non-white Zimbabweans in possession of agricultural land in question and who are affected by

the Amendment are few in number as compared to white Zimbabwean farmers. But even if numerically these other group of Zimbabweans is less compared to the white Zimbabwean farmers, the fact of the matter is that there are other Zimbabweans who are not white whose lands are affected by the Amendment. The land of these farmers may not have been expropriated yet but is not immune from expropriation, at least, on the basis of the Amendment. It is on these grounds that I am of the view that Amendment 17 does not discriminate against the applicants on the basis of race and therefore does not violate the respondent obligation under Article 6(2) of the Treaty.

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Hon. Justice Dr Onkemetse B. Tshosa